(27,052)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 345.

EDWARD F. JACKMAN, PLAINTIFF IN ERROR,

vs.

THE ROSENBAUM COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1919.

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1 In the Supreme Court of Pennsylvania, Western District.

No. 33, October Term, 1918.

EDWARD F. JACKMAN, Appellant,

v.

THE ROSENBAUM COMPANY.

Appeal from Court of Common Pleas of Allegheny County.

Messrs. Watson & Freeman, Pittsburgh, Pa., Attorneys for Appellant.

2 In the Supreme Court of Pennsylvania, Western District.

No. 33, October Term, 1918.

EDWARD F. JACKMAN, Appellant,

vs.

THE ROSENBAUM COMPANY.

Stipulation as to Record on Writ of Error to the Supreme Court of the United States.

And now, to-wit, April 2nd, 1919, it is stipulated by and between counsel for Edward F. Jackman and counsel for The Rosenbaum Company that upon the writ of error allowed by the Supreme Court of the United States to the decision of the Supreme Court of Pennsylvania in the above entitled case, there shall be returned to the clerk of the Supreme Court of the United States the following papers and documents which shall constitute the record in said case:

Declaration;
Plea;
Præcipe for issue:
Testimony of the following witnesses:

	Pages in printed record in Supreme Court of Pennsylvania.	Pages in typewritten transcript filed in Common Pleas Court.
James L. Stewart.....	14*a*- 34*a*	1- 23
	189*a*-197*a* (ending with "A. Yes, Sir.")	196-205
3		
James T. Steen.....	34*a*- 99*a*	24- 97
	520*a*-524*a*	570-575
Edward F. Jackman...	99*a*-147*a*	97-150
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	489*a*-502*a*	533-550

Defendant's Exhibits B, B-1 and E;
Charge of the court;
Plaintiff's requests;
Defendant's requests;
Verdict;
Motion for judgment n. o. v.;
Opinion of Judge Cohen;
Docket entries in Common Pleas Court;
Assignments of error in Supreme Court of Penna.;
Opinion of Supreme Court of Penna.;
Docket entries in Supreme Court of Penna.;
Writ of error to Supreme Court of United States;
Citation U. S. Supreme Court.

H. F. STAMBAUGH,
JOHN M. FREEMAN,
Attorneys for Edward F. Jackman.
A. LEO WEIL,
WEIL & THORP,
Attorneys for The Rosenbaum Co.

4 [Endorsed:] No. 33, Oct. Term, 1918. Edward F. Jackman, Appellant, vs. The Rosenbaum Company. Stipulation as to Record on Writ of Error to the Supreme Court of the United States. Filed Apr. 2, 1919. Supreme Court, W. D.

5 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

In the Court of Common Pleas of Allegheny County, Pennsylvania.

No. 1373, April Term, 1915. Docket "A."

1373.

EDWARD F. JACKMAN

vs.

ROSENBAUM COMPANY, a Corporation.

February 24, 1915. Summons in Trespass to first Monday of March, 1915. March 15, 1915 Sheriff returns writ served February 25, 1915 on Defendant Company. April 3, 1915 Declaration filed. Eo die Rule on Defendant to Plead filed. April 16, 1915, Plea Filed. April 16, 1915 Præcipe for Issue filed. July 3, 1916 Præcipe for Issue Filed. March 19, 1917 on trial list and jury sworn. March 28, 1917 Plaintiff and Defendant's points filed. Eo die Verdict for Plaintiff in the sum of Twenty-five thousand ($25,000.00) Dollars. March 31, 1917 motion ex parte defendant for judgment non obstante veredicto. Eo die motion and reasons ex parte Defendant for a new trial with leave to file additional reasons within ten days. April 7, 1917 Testimony lodged. April 10, 1917 additional reasons for new trial. Ex parte Defendant filed. April 23, 1917 on motion, the defendant is hereby granted leave to withdraw the motion for new trial. April 23, 1917 Testimony filed. And now, September 15, 1917, the motion for judgment N. O. V. is granted and judgment for plaintiff is hereby reversed, and judgment directed to be entered in favor of the defenadnt. Eo die Exception allowed to Plaintiff. Eo die opinion filed. December 22, 1917 Certiorari in appeal ex parte Plaintiff to Supreme Court filed.

From the Record,

[Seal of Court of Common Pleas of Allegheny County, Pennsylvania.]

WILLIAM B. KIRKER,
Prothonotary.

6 In the Court of Common Pleas of Allegheny County, Penna.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN

vs.

THE ROSENBAUM COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania.

Declaration.

The plaintiff, Edward F. Jackson, claims of the defendant, The Rosenbaum Company, the sum of Seventy-Five thousand ($75,000.00) Dollars, which is justly, truly and legally payable to him, the said plaintiff, upon a cause of action, of which the following is a statement:

The plaintiff is and was at all times since the matters hereinafter complained of arose, the owner of a certain lot or piece of land situate in the City of Pittsburgh, Allegheny County, Pennsylvania, being parts of lots Nos. 112 and 113 in Woods Plan of Pittsburgh, fronting 75 feet on Penn Avenue and extending back, preserving the same width, a distance of 112.50 feet to Exchange Alley, and having erected thereon a large brick building known as the Duquesne Theatre, adapted and used for theatrical purposes and so used at all times for more than twenty-four years last past.

The defendant is a corporation organized and existing under the laws of the State of Pennsylvania under charter granted January 17, 1913, and enrolled in the office of the Secretary of the Commonwealth in Charter Book Vol. 131, p. 454, and is engaged in
7 the wholesale and retail mercantile business in the City of Pittsburgh aforesaid, and is, and was when the matters complained of arose, the lessee, and in possession of a certain lot or piece of ground situate on said Penn Avenue and adjoining the plaintiff's premises aforesaid on the east boundary thereof.

That said defendant in or about the month of May, 1914, commenced the construction of a large department store building pursuant to the terms of its said lease, upon its said premises adjoining the east side of said Duquesne Theatre property, and, in the course of the construction of said building, on or about the 25th day of May, 1914, proceeded to erect a party wall upon its said premises and the plaintiff's premises, said wall to extend from Penn Avenue to Exchange Alley, a distance of 112.50 feet, more or less, between the said theatre building and said department store building.

That the defendant on or about the 6th day of June, 1914, preparatory to the erection of said party wall, entered upon the plaintiff's premises and commenced the removal of the east wall of the said Duquesne Theatre building and from the beginning of said work rendered the said building wholly unfit for use for any purpose whatsoever, and particularly for theatrical purposes, for which it was

especially adapted and furnished and then being used by the plaintiff's tenant, The Harry Davis Enterprises Company.

That the said defendant during the removal of said east wall and the construction of said party wall, wrongfully, unlawfully and negligently delayed the work thereon and wrongfully, unlawfully and negligently failed and refused to provide an adequate force of workmen for the prompt completion of said work and failed to
8 adopt the requisite methods necessary to secure the prompt completion of said work and so continued at all times to delay the construction of said party wall, so that the erection of said wall to the height of the theatre building that the building could be connected therewith was not completed until on or about October 1, 1914.

That the said defendant in the removal of the east wall of said theatre building and the construction of said party wall rendered said theatre building untenantable and wholly unsuitable for use for any purpose and particularly for theatrical purposes and damaged said building and its furnishings, equipment and decorations, and particularly destroyed the electric wiring and heating systems thereof. That the said party wall was not erected to the height of said theatre building until on or about October 1, 1914, at which time the annual renting season of said theatre for theatrical purposes had passed by. Defendant also after said wall was erected to the height of the theatre building negligently and unlawfully failed and refused to restore said building and its said furnishings, equipment, decorations and its electric wiring and heating systems to as good condition as existed when said work was commenced or to make said building suitable for use and wholly abandoned the same, whereupon the plaintiff was compelled at his own expense to restore said building and its equipment and furnishings to their former condition and make it suitable for use, and expended therefor $19,972.78 as shown by itemized statement hereto attached, made part hereof and marked Exhibit "A", which cost is fair and reasonable; all of which expenditures were incurred by plaintiff in restoring said building to its former condition which it was the defendant's duty to perform.

9 That by the exercise of due diligence and care on the part of said defendant the said party wall could have been completely constructed to the height of plaintiff's said building, and said Duquesne Theatre building restored to its former condition and put in suitable condition for use for theatrical purposes, on or before the 1st day of August, 1914.

Plaintiff avers that the defendant knew on or about June 6th at the time work on said party wall was begun, that the then existing five-year lease on the said premises for theatrical purposes expired on or about September 1, 1914, and defendant knew that plaintiff was then endeavoring to rerent the said building for theatrical purposes for an additional term of one year or longer, and that in order to rent said building for the purposes aforesaid, it was necessary that the same be fit for occupancy for theatrical purposes on or before the said first day of Sept. 1914, which was the beginning of the annual

theatrical season, and that in case the said building was not completed ready for occupancy by said date, that the plaintiff would, in all probability, be unable to rent the same for said theatrical season, and by reason thereof would lose the entire rental for said premises for the year expiring September 1st, 1915.

Plaintiff avers that had said building been in suitable condition for occupancy on or about the first of September, 1914, which defendant well knew, as aforesaid, was the usual and customary period for the beginning of the annual theatrical season, plantiff could have leased said premises for theatrical purposes for said season ending September 1st, 1915, at a rental of not less than $40,000
10 per year, with the additional cost for watchman's service amounting to $1560.00 per year. That owing to the negligent acts and delays of the said defendant in failing to prosecute and complete said work with the requisite diligence and care, it was impossible for the plaintiff to rent said building for said theatrical season of 1914 and '15, or any part thereof, up to the present time, and defendant has thereby caused plaintiff to lose the rental for said premises for said theatrical season.

That it was the duty of said defendant to use and exercise not only ordinary diligence and care in the removal of the said east wall of the Duquesne Theatre building and in the construction of said party wall, but to use every reasonable precaution that care and skill might suggest in the execution of said work so as to protect the plaintiff from all avoidable injury, and particularly to the end that plaintiff should not be deprived of the use of his said property for any longer period of time than was reasonably necessary, in the exercise of such precautions, diligence and care, for the removal of said wall and the construction of said party wall, but the defendant wrongfully and unlawfully neglected and failed to exercise requisite diligence and care in both the removal of said east wall of the Duquesne Theatre and the construction of said party wall.

It was furthermore the duty of said defendant to restore said Duquesne Theatre building, after the completion of said party wall, to the condition that existed and in which it found it when said work was commenced or to restore it to a condition equally as good and as suitable for the purpose for which it was adapted and used as that which existed when said work was commenced, which duty defendant wholly neglected, failed and refused to perform.

11 Whereby defendant has damaged the plaintiff in the sum of Seventy-Five Thousand ($75,000.00) Dollars, for the recovery of which this suit is brought.

L. M. PLUMER,
WATSON & FREEMAN,
Attys. for Plff.

12 EXHIBIT "A."

Wm. D. Beatty Co., building contractor, for labor and material furnished for repairs at Duquesne Theatre and Contractor's commission thereon,		$14,029.24
Metzkes & Kaufman, for decorating interior Duquesne Theatre,		735.00
A. T. Kurner, painting,		887.00
Taylor & Dean, repair work, new floors on landing, erecting fire escapes which had been removed and making repairs to fire escapes and painting same,		273.50
Iron City Heating Co., labor and material for general repairs to heating system,		152.50
Weldon & Kelly, repairing plumbing necessitated by removal of east wall by the Rosenbaum Company,		832.39
Boggs & Buhl, hanging draperies,		31.62
Footers' Dry Works, cleaning draperies,		60.00
General Fire Extinguisher Co., labor and material for repairing the sprinkler system of Duquesne Theatre,		222.92
Rasner & Dinger, for labor and material furnished for the replacement and repair of the sheet metal work on the Duquesne Theatre building,		2,000.10
American District Telegraph Co., repairing sprinkler equipment,		35.91
Duquesne Laundry Co., laundry services,		9.75
Pittsburgh Paint Supply Co., paints, painters' supplies and brushes,		14.60
To cleaning building and premises,		150.00
One section of hose and nozzle,		47.50
White washing,		25.00
		$19,507.03
13 Amount brought forward,		$19,507.03
Credit on Wm. D. Beatty Co. for four ceilings and ten balcony light fixtures,	$167.50	
" on same bill 10% on balcony light fixtures,	4.75	
" on woodwork for three shutters,	30.00	
" on account of Rasner & Dinger's bill for three shutters,	100.00	
		302.25
Balance,		19,204.78
James T. Steen, architect's commission on balance,		768.00
		$19,972.78

14 In the Court of Common Pleas of Allegheny County, Pa.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN

vs.

THE ROSENBAUM COMPANY, a Corporation.

Plea.

And now, to wit, this 16th day of April, 1915, comes the defendant, The Rosenbaum Company, by its attorneys, and pleads not guilty.

WEIL & THORP,
Attorneys for the Rosenbaum Company.

15 (Endorsement of Plea:) In the Court of Common Pleas of Allegheny County, Penna. No. 1373, April Term, 1915. Edward F. Jackman vs. The Rosenbaum Company, a corporation. Plea. Prothonotary's Office. Filed Apr. 16, 1915, Allegheny County, Pa. Weil & Thorp, 821 Frick Bldg., Pittsburgh, Pa.

16 In the Court of Common Pleas of Allegheny County, Penna.

No. 1373, April Term, 1915.

E. F. JACKMAN

vs.

ROSENBAUM COMPANY.

Præcipe for Issue.

To W. B. Kirker, Esq., Prothonotary.

SIR: Place the above-stated case at issue.

WATSON & FREEMAN,
Attorneys for Plaintiff.

July 3rd, 1916.

17 (Endorsement of Plea:) No. 1373, April Term, 1915. E. F. Jackman vs. Rosenbaum Company. Præcipe for Issue. Prothonotary's Office. Filed Jul- 3, 1916, Allegheny County, Pa. Watson & Freeman, St. Nicholas Bldg., Attys. for Pltff.

18 In the Court of Common Pleas, Allegheny County, Pennsylvania.

No. 1373, April Term, 1915. A.

EDWARD F. JACKMAN

vs.

THE ROSENBAUM COMPANY.

To William B. Kirker, Prothonotary:

You are hereby directed to place the above stated case on the issue docket.

WATSON & FREEMAN,
Attorney- for Plff.

19 No. 1373, Apr. Term, 1915. Edward F. Jackman vs. The Rosenbaum Company. Præcipe for Issue Docket. Prothonotary's Office. Filed Apr. 26, 1915, Allegheny County, Pa. Watson & Freeman, Attorneys for Plff. Office ——.

20 In the Court of Common Pleas of Allegheny County, Pa.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN

vs.

ROSENBAUM COMPANY, a Corporation.

Before Hon. Josiah Cohen, J., and a Jury.

Trial commenced Monday, Mar. 19, 1917.

Appearances:

For the Plaintiff: Messrs. Watson & Freeman; Ernest C. Irwin, Esq.;
For the Defendant: Messrs. Weil & Thorp.

Official Notes of Trial.

21 JAMES L. STEWART, a witness produced in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Irwin:

Q. Mr. Stewart, what is your business?
A. I am a constructing engineer.

Q. I believe you were in charge of the construction of the Rosenbaum store building on Sixth and Penn?

A. Yes, sir.

Q. At the time you erected that building, I believe you tore out the wall of the Duquesne Theatre and erected a party wall?

A. Yes, sir.

Q. Can you tell me when you first broke through the Duquesne Theatre wall for the purpose of shoring up the building?

A. Yes, sir, it was about the 6th of June, 1914.

Q. When did you begin tearing down the wall? I mean the Jackman wall?

A. I don't remember exactly what time we began to tear that wall down, because we had considerable preliminary work to do before the wall could be removed.

Q. Can you give the date?

A. I don't remember the date at all.

Q. Well, approximately what date?

A. I don't believe I could even approximate it. We have a record of it.

Q. I asked you to bring the record with you. Do you have any records with you by which you can show that?

A. Yes, sir, we have some records here.

Q. I wish you would get them.

22 By the Court: I have concluded that it is proper that I should say to you that while I should be very glad to try this case, the President of the Rosenbaum Company is a nephew of mine by marriage, having married my niece. Now, if either side are of the opinion that it would be better that the case should be tried by some other judge, for that reason, I shall not feel at all offended, whilse I am perfectly willing to try the case. Now, if either one of you gentlemen have anything to say with reference to what I have just stated, say it now.

Mr. Irwin: We make no objection, Your Honor.

By the Court: What does the other side say?

Mr. Weil: We certainly make no objection, if Your Honor please, and the fact that Your Honor may be related by marriage to the President of the company does not strike me as being any objection at all, to the Judge sitting and hearing, and determining the case against a corporation. If it were, we would have very few cases tried.

23 By the Court: I thought it better to suggest that before we proceeded. I thought it right. It makes no difference to me at all.

Mr. Irwin:

Q. What was that date?

A. It was about July 21st.

Q. That you began to tear it down?

A. Began actually tearing down the wall, yes, sir.

Q. Just as a matter of refreshing your recollection, Mr. Stewart I call your attention to the testimony you gave in the Jackman versus Davis case, in which I believe you said the tearing down started between the first of June and the first of July.

A. Well, those are not the facts.

Q. Those are not the facts?

A. No. Of course, we were really in and around the wall between the first of June and some time in the latter part of September, but the actual tearing down of the wall began about the 21st of July. Prior to that we had cut some holes in the wall to get into the wall, but we had not erected any further than to that extent.

Q. Mr. Stewart, in building the party wall along the Jackman property, how deep did you go in your excavations?

A. Adjoining the Jackman property?

Q. Yes.

A. It was approximately 33 feet below the curb.

Q. That is, along the whole line of the wall?

A. Yes, sir.

24 Q. What have you in the store building there along this Jackman property? Is there just one basement?

A. Along the Jackman property there is just one basement, yes, sir.

Q. How is the party wall—I don't know whether I can use the technical expression—but how is it supported on the bottom, how is it footed up?

A. It is supported on top of a concrete wall resting on the foundations for the steel frame.

Q. You excavated down about 33 feet and then built a concrete wall?

A. We put in the foundations for the steel frame of concrete, and then put the steel grilling supporting the steel frame on top of reenforced concrete footings. On top of that we started the steel frame.

Q. Did those footings go down this 33 feet you mentioned?

A. Yes, sir, the bottom of the footings were approximately 33 feet below the curb.

Q. At what date, Mr. Stewart, did you have the wall along the Jackman property up to the top of his theatre?

A Some time in the latter part of September.

Q. I believe, Mr. Stewart, at first you had planned to erect a wall at the bottom of it entirely on the Rosenbaum property up to the top of the Jackman wall, and then to overlap the Jackman wall a certain distance, and go from there on up? Is that not the case?

A. Just repeat, that, please.

(Question repeated).

A. No, it is not the case. The foundations as built are exactly as they were shown originally.

25 By the Court. Was there a party wall there before?

Mr. Irwin: No, sir.

By the Court:

Q. What do you mean by the word "originally"?
A. As they were originally planned.

Mr. Irwin:

Q. Is the wall as built now the one that was originally planned?
A. With the exception that it was intended to support the old Jackman wall and bring the concrete fodndation for the Rosenbaum wall up under it—support it and leave it stand.
Q. Then your foundation plan has not been changed?
A. No, sir, the wall from the bottom of the old Duquesne Theatre wall to the roof has been changed.
Q. Now, the original plan was to carry your wall from the foundation wall to the top of that wall entirely on the Rosenbaum property?
A. No, the centre line of the column is on the property line, half of the foundation being on the Rosenbaum property and half of it being on the Duquesne property.
Q. You didn't understand the question. From the top of the foundation, your original plan was to build a wall up alongside of the Duquesne wall and entirely on the Rosenbaum property up to the height of that wall?
A. Yes, sir, a curtain wall.
Q. Then how far did your original plan contemplate overlapping the wall at the top?
A. I don't remember exactly. I think it was a 13-inch wall and was on the centre line of the property at the top, so it would overlap half of thirteen inches.
26 Q. That would be six and a half inches?
A. Yes, sir.
Q. At what date did you change that plan?
A. That plan was changed some time about the first of June.
Q. Was your steel fabricated for the original plan?
A. Yes, sir.
Q. Mr. Steward, how far below the curb did the Jackman wall extend?
A. Approximately seven feet.
Q. Seven feet?
A. Yes, sir.
Q. Then, as I understand you, Mr. Stewart, your first plan was to support the present Jackman wall on the new foundation, which was to be built up under it? and then to build your steel frame up beside that wall, to the top of it?
A. Well, the steel frame was enbedded partly in this concrete foundation.
Q. But from the foundation to the top of the Jackman wall, your steel frame was to follow up alongside the Jackman wall?
A. No, the Jackman wall was to be chased out, cut into, to admit half of the steel column—part of the steel column. In other words, the centre of the steel columns were right on the property line.

Q. How wide were the columns?

A. They varied as you went up. At the bottom they were probably 14 or 16 inches, I don't remember exactly.

Q. How thick was the Jackman wall?

A. That also varied in thickness. I couldn't say how thick it was.

27 Q. Did it contemplate also that in putting in your—speaking as a layman, I will call them cross beams from the columns—that they were to be chased in the wall?

A. I think so, yes, sir. Neither the columns nor the cross beams were chased in to the full depth of the old Jackman wall, just went partially through the wall.

Q. That would mean a distance of six or seven inches?

A. Seven inches or more, yes.

Q. Then, after you changed your plan, it became necessary to order new steel, did it?

A. No, the steel was erected just as originally designed. The thickness of the brick wall was increased over and above what was originally contemplated.

Q. You put needles through the old wall at the places you cut openings through them, from which needles you supported the building during the time of construction, did you not?

A. No, sir.

Q. Did you not put steel needles through the wall?

A. Through the wall?

Q. Yes.

A. No, sir.

Q. Well, whatever you call them, Mr. Stewart—perhaps you don't call them needles—didn't you put through steel beams from which you supported the building while the wall was being constructed?

A. If you wish, I will describe just how we supported that temporarily.

Q. No, I am asking you to answer my question.

28 A. There were some steel beams stuck through the wall, yes, but they were not—they were independent of the old wall entirely; temporary beams came through the wall.

Q. What were they put through for?

A. They were part of the frame work that supported temporarily the old theatre building.

Q. What supported the ends of those beams on the Jackman side?

A. They were supported in two places on the Jackman side. In one place, they were carried back far enough into the Jackman basement to get on the solid soil where they would not be disturbed in the excavation for the foundations for the new Rosenbaum building. At the other end they were supported on steel pipes, approximately seven inches in diameter, filled with concrete, and drilled to the solid rock.

Q. That would be on the Rosenbaum side?

A. No, it was just inside of the old Jackman wall.

Q. Do you mean clear inside of the Jackman property?

A. Yes, sir, clear inside of the Jackman property. Now, these

cross beams from these two supports did stick through in one or two places, the old Jackman will.

Q. Mr. Stewart, according to your original plan, did you intend to put the elevators along the Jackman line where they now are?

A. Yes, sir.

29 Cross-examination.

By Mr. Weil:

Q. Mr. Stewart, you were asked if you were in charge of the building and erection of the Rosenbaum building and of this party wall between the Jackman property and the Rosenbaum property, and you answered that you were. You were, as a matter of fact, the contractor, were you not?

A. Yes, sir.

Q. And you had the contract for the erection of the building and for the removal of this wall and to do that work that was done there?

A. Yes, sir.

Q. And that was a written contract?

A. Yes, sir.

Q. Have you a copy of the contract with you?

A. We have a copy here, I think. We haven't a copy here, but I will get one.

(Question withdrawn for the present.)

Q. The plans and specifications for the erection of the building and of this wall were originally provided for by the plans prepared by the architect of the building, Mr. Jarvis Hunt of Chicago, were they not?

Objected to, as not cross-examination.
Objection sustained.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

30 Q. Were you erecting these buildings according to any plans?

Objected to, as not cross-examination.
Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

A. We were.

Q. Who prepared those plans?

Objected to, as not cross-examination.
Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

A. Jarvis Hunt, of Chicago.

Q. Have you those plans here?

A. Yes, sir.
Q. You stated that you broke through the theatre wall on June 6th, 1914, I believe you said?
A. Yes, sir.
Q. Was that the first interference with that wall by you?
A. I don't remember exactly. We broke in, put several holes in it.
Q. Well, that was not what I meant to ask. Was that the first interference with the interior of the theatre, on the opposite side of the wall, the theatre side of the wall, June 6th?
31 A. As near as I can remember, yes, sir.
Q. Why did you break through?
A. We broke through to get into the theatre.
Q. Why didn't you go through the door?
A. We were not permitted to go through the door.
Q. Did you ask permission?
A. Yes, sir.
Q. Of whom?
A. Mr. Davis, the lessee.
Q. The tenant of the building?
A. The tenant of the building, yes sir.
Q. Now, you say that you commenced tearing down the wall on July 21st?
A. About July 21st.
Q. Now, between the time you broke through and July 21st, what, if anything, were you doing, with reference to this wall?

Objected to, as not cross-examination.
Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

A. We were preparing temporary support for the theatre, to support and take care of the theatre when the old wall was removed.
Q. Just explain that a little more fully, Mr. Stewart, so the Jury and myself can understand it.
32 A. The foundations for this party wall went down approximately 33 feet below the curb on Penn Avenue, and the foundations were about 15 or 16 feet wide. One-half of them extended under the theatre and the other half extended on the adjacent property leased by the Rosenbaum Company. In order to support the theatre during the process of tearing down the condemned wall and building the new wall to support the——

Mr. Irwin: I ask that that be stricken out, what the witness has said about the condemned wall.

A. (con.) —the old wall, the old Duquesne Theatre wall. And building the new party wall, it was necessary to put in a temporary support to support the floors of the theatre, the balconies, the stairways, the proscenium arch, the roof and the water tank on the roof. In order to properly support it so there would be no settlement, we had to go our foundation below the new foundations for the new

party wall. So we went in the Duquesne Theatre, and just inside of the old wall we sunk, as I remember it, 11 steel casings to rock. We filled the steel casings with concrete and on top of the casings we put some steel beams, and on top of the steel beams we carried the wood support to carry the part of the theatre as I have just described. The foundations under the old party wall were practically continuous from Penn Avenue back to the alley; there wasn't any spaces between the foundations to put a temporary support, so these steel casings were drilled down through the earth, and eventually were incorporated in the foundations for the new building, we just cut them off after the new wall was built and the temporary frame taken out.

33 Q. This method that you have described, after putting in the foundations, is what is termed by architects shoring, isn't it?

A. Yes, sir.

Q. And this shoring was intended to support that whole side of the Duquesne Theatre the same as it had been supported prior to that time with the wall?

A. Yes, sir.

Q. And that, as I understand you, had to be placed inside of the theatre, so as not to interfere with the building of the party wall when you were ready to build that?

A. Yes, sir.

Q. It had to be so arranged?

A. It had to be so arranged that it would not interfere with the building of the new wall at all.

Q. When you built this wall to the top of the theatre, you were asked what time it was completed up to the top of the theatre. You haven't the exact date, have you, when it was completed to the top of the theatre? Let me show you a letter that may refresh your recollection. Just a moment and I will show you the letter.

(NOTE.—It is admitted by counsel that it was carried up to the top of the theatre roof about September 15th.)

(Question withdrawn.)

Q. After that time, was that wall further extended above the theatre?

A. Yes, sir.

34 Q. How many stories, or about how many feet, either one, if you can recall it?

A. There were twelve stories above that.

Q. Above the theatre wall?

A. No.

Q. What?

A. No, about eight stories above the theatre wall, I think.

Q. It was carried, this same wall, about eight stories above the roof of the theatre?

A. Yes, sir.

Q. Do you recall about how many feet?

A. About 95 or 100 feet.

Q. The plans originally contemplated, you stated, the building of this foundation the same as it was finally built?

A. Yes, sir.

Q. And that covered a portion of the Jackman property and a portion of the Rosenbaum leased property?

A. Yes, sir.

Q. It was the intention, however, I think you have stated, that after you reached the Jackman or theatre wall, that there would be columns, steel columns, half of them set into the old Jackman wall and carried up in that way?

A. Yes, sir.

Q. And also the side——

A. I wouldn't say exactly half, because the old Jackman wall might not have been just on the party line.

Q. Well, I don't care particularly about the amount, but they were to be, as you explained it, chased in?

A. Yes, sir, chased into the old wall.

35 Q. And carried up along the side in that way?

A. Yes, sir.

Q. And the beams connecting these columns, which I believe you call girders——

A. They were channel beams.

Q. How were those to be fastened? Were they to go into the Jackman wall also?

A. I am not really positive about that. I think they went partially in the Jackman wall. They are rather small channels, and the back, the flat of the section, was placed against the Jackman wall. I don't remember how far it went in.

Q. Now then, according to the original plans, after you reached the top of the Jackman building, you were going to run your wall up then by a projection of the brick and so forth over the Jackman wall, were you not?

A. Yes, sir.

Q. That was according to the original plans?

A. Yes, sir.

Q. And that was one of the changes that was made when the Jackman wall came down, wasn't it?

A. What change?

Q. When the Jackman wall came down, you built the wall straight up instead of building it over the Jackman wall and then projecting the wall over? You just built it straight up, because there was no wall there to build on?

A. Yes, sir.

Q. That was the fact, wasn't it?

A. Yes, sir.

36 Q. And that change was made in the plans?

A. Yes, sir.

Q. Was that the only change that was made in the plans in that respect, or with reference to that wall?

Objected to, as not cross examination.
Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

A. There were no other changed, excepting that the brick wall was increased a little in thickness, to support the joists and the timbers in the theatre.

Q. Now, those were the changes that were made?
A. Yes, sir.
Q. And you said those were made about June 1st?
A. Yes, sir.
Q. And they were made before you broke through the wall of the Jackman building?
A. Yes, sir.
Q. I suppose you have those plans?
A. Yes, sir.
Q. Showing those changes?
A. Yes, sir.
Q. And you worked with those plans before you?
A. Yes, sir.
Q. What did you mean when you said that the Jackman wall extended about seven feet below the curb? I didn't understand what you meant by that.
A. That was the foundation, the cellar wall, of the Jackman.
37 Q. Do you mean the old——
A. The old wall.
Q. The old Jackman wall?
A. Yes, sir.
Q. Or the old Jackman foundation?
A. The bottom- of the old Jackman foundations were about that distance below the curb.
Q. But the new foundation, I think you said was 33 feet below the curb?
A. Yes, sir.
Q. You spoke about drilling these casings. What do you mean by that?
A. We had a well driller drill a hole through the earth and gravel——
Q. How wide?
A. About 8 inches in diameter. And drill it to rock. We took out the earth and gravel from inside of the casing and filled it with concrete.
Q. Did you put any iron pipe down there?
A. The casing I speak of is the iron pipe.
Q. Then you had these holes drilled about 8 inches, you say, in diameter?
A. Yes, sir.
Q. And these iron pipes put in?
A. Yes, sir.

Q. And filled those with cement?
A. Yes, sir.
Q. That was the foundation, as you explained, was it, on which you put this temporary support to hold up that side of the theatre?
38 A. Yes, sir.
Q. I believe you told us, but I have forgotten, how many of these holes did you have to drill.
A. There were eleven, I think.
Q. Extending from Penn Avenue how far back?
A. Back to the alley, spaced about equidistant apart.
Q. How deep did they go? Thirty-three feet, is that what you meant?
A. They went more than that; they went to rock.
Q. How far was that?
A. I don't know exactly. It was probably fifty feet or more.
Q. Altogether?
A. Yes, sir.
Q. From the top?
A. From the top.
Q. Were there plans and specifications for this work?
A. No, sir.
Q. Were there plans and specifications for the shoring?
A. We made plans for the shoring ourselves.
Q. Well, there were plans made for it?
A. Yes, sir.
Q. I don't care who made them.
A. Yes, sir.
Q. And they were made by engineers in your office?
A. Engineers in my office, yes, sir.
Q. How long have you been in the contracting business, Mr. Stewart?
A. About twenty or twenty-five years, I don't remember exactly how long.
39 Q. Engaged in business in this section?
A. Yes, sir.
Q. You called yourself a constructing engineer, in answer to Mr. Irwin's question. What is the difference between a contractor and a constructing engineer?
A. There isn't any difference.

Mr. Irwin:

Q. He gets more money?
A. Tries to get more money. I would like to qualify a little bit on that. The complication of a new steel building structure requires a man with more than the ordinary contracting ability: he has to understand the construction of these steel buildings with all of its complicated mechanism, and we do that sort of work exclusively, and that was my reason for my calling myself a constructing engineer.

Mr. Weil:

Q. In other words, then, as I understand you, in putting up these iron and steel framed buildings, it requires the services of an engineer as well as of the ordinary contractor?

A. Well, he can do it better if he understands it thoroughly and its mechanism.

Mr. Irwin:

Q. Was anything done by you, Mr. Stewart, in the interior of the Jackman property to restore it to shape after the wall was built on past the building?

A. We supported the floors and pieced them out, but we didn't do any plastering or decorating or any work of that character.

40 JAMES T. STEEN, a witness produced in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Irwin:

Q. Mr. Steen, what is your business?

A. I am an architect.

Q. How long have you been in that business?

A. About thirty-two years.

Q. What has been the nature of your experience in that work? What sort of work have you done?

A. Oh, a variety of work, buildings of all kinds.

Q. Where is your office?

A. Fulton Building.

Q. Have you been around Pittsburgh during these thirty-three years?

A. All of them.

Q. Have you had experience in the construction of any buildings of any size?

A. Yes, sir.

Q. Will you give us some examples?

A. The House office building at Water and Smithfield; the Fidelity Title & Trust Company, and the Pittsburgh Dry Goods Company buildings on Penn Avenue.

Q. A little louder.

A. The Pittsburgh Dry Goods Company buildings on Penn Avenue, Rauh Brothers Building on Penn Avenue, the Dollar Savings Bank.

Q. What one?

A. The Dollar Savings Bank.

41 Q. The Dollar Savings Bank, you say?

A. Yes, sir. The Pittsburgh Life & Trust building.

Q. Mr. Steen, did you at any time make any inspection of the

Duquesne Theatre property while the Rosenbaum building was being constructed?

A. I did, yes, sir.

Q. When did you make such an inspection?

A. The first inspection I made was on June 6th, 1914.

Q. At that time, had anything been done toward tearing down the wall?

A. No. There were some holes through the wall of the Duquesne Theatre at that time.

Q. You mean holes down along the basement line?

A. Down about the top of the basement, yes, sir—just above the basement.

Q. When did you next look at the wall?

A. On July 10th.

Q. What was being done at that time with relation to the Duquesne wall, if anything?

A. On July 10th, the wall of the Duquesne Theatre was down, torn down, to a distance of about 3 feet below the top of the basement wall.

Q. That is, the brick wall was all down?

A. The brick wall was entirely down, and about two to three feet of the basement wall.

Q. Mr. Steen, have you had any experience in building party walls?

A. Oh, yes.

Q. Have you had any experience in erecting party walls where the necessity of carrying up the other building was in question? That is, where there was another building?

42

A. Oh, yes.

Q. And in those cases, you would have, I presume, to shore up the other building, would you?

A. Yes, sir.

Q. Did you hear Mr. Stewart's testimony on the stand as to the depth of the excavation, and how the wall was shored up, and so forth?

A. I did.

Q. Did you examine the Jackman property and the Rosenbaum property during the construction at any other time than you mentioned, on the 6th of June and the 10th of July?

A. No.

Q. Were you about that property at any time afterwards?

A. Yes, sir.

Q. I believe you had charge of the repair work inside the theatre?

A. I did, yes, sir.

Q. Mr. Steen, are you able to give an opinion as to how long it should take to remove an old wall the size of the Duquesne Theatre wall and to erect a party wall of the character described here by Mr. Stewart, up to the height of the Jackman theatre, under the conditions that he named?

Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial.

Mr. Irwin:

Q. Mr. Steen, I will ask you to consider as part of the question: Considering the fact that this was a steel building of twelve stories, adding that condition to the one named in the question asked you.

43 Mr. Weil: The question is still objected to, for the reason that there is not a particle of evidence in this case to show what was being done with reference to the Rosenbaum building, as to other portions of it, or that this witness has the slightest knowledge on that subject. He simply went into the Jackman building twice, on June 6th and July 10th. He cannot testify about conditions about which there is no evidence in the case so far.

By the Court: The objection is sustained, because there is no sufficient data upon the strength of which this witness could estimate at the present time.

To which ruling of the Court counsel for plaintiff except.

Exception allowed and bill sealed.

Here Court took a recess until 1 o'clock P. M.

Afternoon Session.

And now the hour of 1 o'clock P. M. having arrived, Court met, pursuant to adjournment.

JAMES T. STEEN recalled.

Mr. Irwin:

Q. Mr. Steen, how frequently did you see the Rosenbaum building while it was under construction?

44 A. Oh, three or four times a day I passed there.

Q. How is that?

A. I was passing there three or four times a day.

Q. Is your office near this building?

A. Within a half block of it.

Q. Are you familiar with the kind of a building it is?

A. Yes, sir.

Q. And with the methods of construction in it?

A. Yes, sir.

Q. And with the general size of the building?

A. Yes, sir.

Q. Mr. Steen, are you familiar with the character of the material that was met with in the excavation for this building?

A. Yes, sir.

Q. Did you have anything to do with the building of the present Duquesne Theatre Building?

A. Well, with a portion of it. The present old front on the building of the Duquesne Theatre is as it was originally built from the plans and specifications made by me, and the return around on the

Jackman sides of the old wall that was torn down was part of the original building built in 1885.

Q. Did you have anything to do with that building?

A. The original building?

Q. Yes.

A. Yes, sir.

Q. Did you have anything to do with the reconstruction which was made in 1890?

A. Changing it to a theatre?

Q. Yes.

A. No.

45 Q. You did not?

A. No, except the general oversight of the building, when they were building the walls. There were different contractors and different architects.

Q. Mr. Steen, in the Rosenbaum building, how was the Jackman wall carried up—I mean the party wall—with relation to the rest of the building? That is, was it progressing evenly with it, or behind it or ahead of it?

A. Behind it.

Q. Was that continuous through the operation?

A. Continuous through the operation.

Q. Well, was it much behind the rest, or how?

A. Yes, sir, considerably.

Q. Did you notice anything while this wall was going up as to the number of workmen they had on this wall, compared with the rest of the building?

A. No, I did not.

Q. What is the general construction of the Rosenbaum Building, what character of building is it, Mr. Steen?

A. It is a skeleton steel frame building, steel frame filled in with brick work and curtain walls.

Q. That is, the outside walls are filled in with brick?

A. Yes, sir.

Q. Have you had experience in building that sort of building?

A. Yes, sir.

Q. Mr. Steen, in building a building of that character, is it necessary to carry the whole building up at once, or can the wall be carried up ahead of the rest of the building?

A. Yes, sir, it is frequently done.

46 Q. What is frequently done?

A. A portion of the building is closed in, an upper portion of the building is closed in on the steel framework before the lower.

Q. Is it necessary to carry the four walls up on unison clear around the building, or can one be advanced ahead of the other?

A. They can be advanced, because the brick walls in a building of that kind are non-supporting.

Q. But I am thinking particularly of a steel skeleton. Can it be advanced?

A. Yes, sir, it can be advanced.

Q. What I mean is, is it necessary to carry your steel skeleton work uniformly in the four walls?

A. Not absolutely.

Q. You say the brick work in that kind of a wall is supported on each floor?

A. Yes, sir.

Q. And you can start half way up the building?

A. Yes, sir.

Q. Mr. Steen, how high is the Jackman theatre, approximately? The top of it, along the line of this wall, from the curb line?

A. Probably sixty feet.

Q. Would it have been possible to have carried this wall up, this party wall, to the height of the Jackman building, without, at the same time, carrying up the other three walls of the building, the Rosenbaum building?

A. Yes, sir.

47 Q. I assume you have to carry up some part of the other structure to support that wall as you went along, would you? Or would you?

A. Well, a building of that kind is built in sections or bays, from one column to another, with horizontal beams connecting it. A section wall like that could be built up if there was one section or bay constructed to the length of the wall connecting the two columns, one in the wall and one outside.

Q. That is, you would only need to carry up one section of the wall?

A. Yes, sir.

Q. Mr. Steen, are you familiar with the use of cement work in foundations on which steel beams are erected?

A. Yes, sir.

Q. How soon after those cement foundations are put in, is it possible—or practicable, I will put it that way—to erect a steel structure on top of it?

A. Oh, three days.

Q. I believe it has been stated here that the Jackman property runs from Penn Avenue back to an alley?

A. Yes, sir.

Q. And the Rosenbaum property runs to the same alley, of course?

A. Yes, sir.

Q. What distance is that?

A. 112 feet, about.

Q. What was the thickness of the old Jackman wall that was torn down?

A. It was 22 inches in the lower story, that is the story above the basement, and I think 18 inches.

48 Q. At the top?

A. Yes, sir.

Q. What is the thickness of the party wall that was erected?

A. I think that was 18 inches thick above the basement for a height of possibly 20 or 25 feet, and above that 13 inches.

Q. It has been stated that that was erected half on each property.

That means at the top it would be about 6½ inches and at the bottom about 9 inches.

A. My recollection is that that lower 18 inches was not half in half. I think for some purpose of which I don't know, that it was built more on the Rosenbaum side, more than half of that 18 inches in that lower 20 or 25 feet.

Q. Now, Mr. Steen, taking into consideration the character of this building as you observed it under construction; the character of the foundations that were put under this party wall, as described by Mr. Stewart; and the character of the work required to support the theatre, as described by Mr. Stewart; and your own personal knowledge of the situation there from observation of it, as you saw it from time to time, I would ask you whether you are able to express an opinion as to the time within which that party wall could have been erected by the observation of due diligence, up to the height of the top of the Duquesne Theatre?

Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial. It is especially objected to, for the reason that the question is limited solely to the time within which the wall could be erected, without reference to the time required to do the other work
49 necessary to anticipate the erection of the wall; there being no evidence yet introduced or facts before the Court as to the exact situation on many of the essential features necessary to determine the only question at issue—that is, the exercise of due diligence with reference to the whole situation and whole operation, not only in caring for and in the protection of the building, the theatre, but also the wrecking of the old situation; also the necessary work to be done to make this work on the party wall harmonious with the remainder of the building operation of which it was a part; and other features essential to be considered in connection with the question, which is the only question at issue here: As to whether or not due diligence was observed by the contractor in the putting up of this party wall after the time required to prepare for putting up the same. Further objected to upon the ground of incompetency; that this is the work of a contractor and not the work of an architect. The witness has not shown by any evidence heretofore introduced that he has had any experience in contracting, but only as an architect having to do with the planning and designing and general supervision, and not with the performance of the actual work.

50 By the Court: The question as propounded, in the judgment of the Court, does not present the necessary elements to justify a response; and therefore the objection is sustained.

To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Irwin:

Q. I renew the same question, and ask you, Mr. Steen, to take also into consideration the tearing down of the old existing Jackman wall, the necessary work for shoring up the Jackman building, the

excavation for the foundations, the construction of the foundations, the construction of the steel work of the party wall, with such additional work as would be reasonably necessary to be carried along with the construction of the party wall so as to properly support it, the building of the brick work into the party wall, and all such other work as would be necessary to construct that party wall fully and completely up to the height of the top of the Jackman building, and taking into consideration whatever was necessary to be carried on in connection with this work——

By the Court: With what work?

Mr. Irwin:

Q. (con.) —with this party wall; whatever was necessary to be carried on in the rest of the building, in conjunction with the party wall. Having taken all those things into consideration, I ask
51 you whether you are able to express an opininon as to the time within which this party wall could have been erected by the exercise of due diligence, to the top of the Jackman wall?

Mr. Weil: The same objection that I made to the previous question, and the additional objection that the things to be taken into consideration must be proved in the case before the witness can express an opinion thereon as to what may be considered the necessary preparations, and so forth, as comprehended in the question, facts that must be presented in the question and proven as part of the hypothetical question or as part of the facts in the case, before the witness may be permitted to express an opinion.

By the Court:

Q. Answer the question. Can you give an opinion? That is the question.

A. Yes, sir.

By the Court: The objection is sustained.

Mr. Irwin: He has already answered that question.

By the Court: The main question is now pending. He says he can give an opinion. Now comes the objection to his giving an opinion, and the objection is sustained.

52 Mr. Irwin: Well, I had not asked that yet. I will ask it, so as to get the record in shape.

Mr. Irwin:

Q. Mr. Steen, in your opinion, based on the matters set forth in the foregoing questions, how soon could that party wall have been erected to the height of the Jackman building, by the use of due diligence?

Mr. Weil: That is objected to, for the reasons already given to the prior question.

By the Court: That is the same question over, and I make the ame ruling.

To which ruling of the Court counsel for plaintiff except. Exception allowed and bill sealed.

Mr. Irwin:

Q. Mr. Steen, did you hear Mr. Stewart state this morning how deep they excavated for the foundation of the party wall?

A. Yes, sir.

Q. And the thickness of that foundation?

A. Yes, sir.

Q. Are you familiar with the character of the work that was done by Mr. Stewart in shoring up the old wall during the construction of the party wall, as testified to by Mr. Stewart?

A. To a certain extent, yes, sir.

Q. Well, did you hear his testimony?

A. I heard his testimony, yes, sir.

53 Q. Are you familiar with the character of the material that composes the soil at this point on Penn Avenue?

A. Yes, sir.

Q. Have you had experience in the construction of foundations such as Mr. Stewart described here, being built of cement, for this party wall?

A. Yes, sir.

Q. Have you had much experience?

A. Well, I have had experience on several operations.

Q. Have you had experience in erecting steel buildings of the general character of this building?

A. Yes, sir.

Q. Do you know what is necessary in carrying up one wall of a building of this kind, what is necessary to be done in relation to the rest of the building, in order to carry that wall up?

A. Yes, sir.

Q. Are you familiar with the time required in building operations such as this to erect steel work after you once get your foundation in place?

A. Yes, sir.

Q. Are you familiar with the time required to build the walls with brick into the steel work after the steel is once constructed?

A. Yes, sir.

Q. Are you familiar with the time that is required in such work as the shoring up of the Jackman building?

A. Yes, sir.

Q. Are you familiar with the time that is required for such work as was done along this foundation in excavating to a depth of

54 33 feet?

A. Yes, sir.

Q. Are you familiar with the time that would be required for an operation such as the tearing down of the old Jackman wall?

A. Yes, sir.

Mr. Irwin: I now propose to ask the witness whether he has an opinion as to the time required to erect the Jackman party wall, taking into consideration the construction of the rest of the building, and the shoring up of the Jackman building, if the same had been prosecuted with due diligence; and, if he has such an opinion, to ask him what that opinion is.

Mr. Weil: This is objected to, for the same reason heretofore given, it being practically the same question as has already been ruled upon by the Court.

Objection sustained.

To which ruling of the Court counsel for plaintiff except.

Exception allowed and bill sealed.

Mr. Irwin:

Q. Mr. Steen, did you have anything to do with the tearing of the Jackman building after the party wall had been erected?

A. Yes, sir.

55 Q. What did you do?

A. I had charge of the fixing up of the interior of the Duquesne Theatre after the wall was built.

Q. When did you go into the theatre with the idea of beginning that work, Mr. Steen?

A. About the 20th of September.

Q. What was the condition of the theatre when you went in there on this side of the theatre, along this wall?

A. Well, the bare brick wall was standing, and the floors partially broken.

By the Court:

Q. What is that?

A. The plastering was broken. The electric wiring system cut off, destroyed. The plumbing down along that side.

Q. What?

A. The plumbing all down along that side, where the dressing rooms were.

Mr. Irwin:

Q. Was the fire extinguisher system affected?

A. Yes, sir, that was destroyed on that side.

Q. Did it affect any marble work?

A. Oh, yes, the marble work of the entrance to the gallery on the side next to the Rosenbaum Building was all out. The marble work of the lobby was partially out and partially broken, and around the ticket office on the side toward the Rosenbaum Building.

Q. Was the stage affected in any way?

A. Yes, sir.

Q. How?

56 A. Well, it was broken in places, and broken through—the floors; and some of it out of level.

Q. Just a little louder.
A. The gutter of the foot lights was mutilated.
Q. What about the roof?
A. The what?
Q. The roof of the theatre?
A. Well, the roof of the theatre showed up a number of leaks after we got in there.
Q. What caused those leaks?

Objected to by counsel for the defendant, under the pleadings; there being no allegations in the Statement of Claim of such an item of damage.
Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. The damage to the roof and gutters and conductors, and also to the skylight, by reason of material dropping from the construction of the wall after it was above the height of the roof of the Duquesne Theatre.

Mr. Weil: I object to that, and ask that the last part be stricken out.
By the Court: The last part is stricken out.

57 Mr. Irwin:

Q. Were you on the roof at any time, Mr. Steen?
A. Yes, sir.

Mr. Weil: There is another objection to that. The allegation is that "The defendant, by the removal of the east wall of the said theatre building and the construction of said party wall, rendered said theatre building untenantable", and so forth.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

Mr. Irwin:

Q. Mr. Steen, were you on the roof of this building at any time?
A. Yes, sir.
Q. Could you see what caused the damage to the roof?
A. Yes, sir.

By the Court: Not "could you"—"did you".

Mr. Irwin:

Q. Did you see?
A. I did.
Q. What was it caused the damage to the roof?
A. The falling down of pieces of brick and cement mortar.

Q. Did any considerable amount of that fall on the roof?
A. A very considerable amount.
Q. What do you mean by that now?
A. Oh, well, barrows of it, a number of barrows, wheel
58 barrows.
Q. Was there any method taken to protect the roof agains the stuff that fell on it?
A. There had been some attempt made at that by means of putting scantling up against the new party wall and sloping them out onto the roof of the Duquesne Theatre and laying planks on it, but it was very indifferently done, and allowed the material to go through the boards, and outside of them.
Q. Would it have been feasible to have erected a protection along there to protect the roof?
A. Perfectly so. It is required by the City in all building operations, on sidewalks.
Q. It is the same character of protection that they have along sidewalks—that could have been done?
A. Yes, sir.
Q. In the course of your operations there in putting the interior in shape, did these injuries to the roof cause any damage or delay?
A. They did.
Q. How was that?
A. Well, they let the water through onto the ceilings, and walls after they had been plastered, and some of them after they were decorated. The plastering had to be removed, and the walls and ceilings re-decorated in places.
Q. Mr. Steen, do you recall a question that arose regarding the connection between the gutter of the roof and the drain pipe not being connected from the roof to the drain pipe?
A. I saw the results of it. I didn't see the disconnection myself but we were flooded.
Q. You mean with water coming through?
A. Yes, sir.
59 Q. How far over the theatre did that extend?
A. Well, it extended over the ceiling, perhaps a quarter or one third of the way along the outside of the wall, and down the sides of the walls.
Q. Well, how did that affect it, if in any way?
A. Well, it loosened some of the plastering and discolored the decoration that had been done.
Q. Now, these materials droppinig on the roof, did they in any way make holes in the roof?
A. Oh, yes, made a number of holes.
Q. What sort of material is the roof covered with?
A. Tin.
Q. Did those holes cause any damage or inconvenience?
A. Caused leaks.
Q. How is that?
A. Leaks, and the cement dropping down from the trowels filled

in the gutters and washed down into the eave pipe and conductors and stopped them up in several cases.

Q. What did that cause?

A. That caused overflow and leakage.

Q. Well, did these various leakages have any effect on the progress of your work?

A. Oh, yes.

Q. How was that?

A. They held us back. After the work was done it had to be done over again, and then we were held back in doing it over, because we couldn't get our men to go under there and work while they were building on the other part of the wall.

60 Q. You mean on the roof?

A. Yes, sir.

Q. Did you ever make any complaint about this?

A. Yes, sir.

Q. Was it remedied after you made any complaint?

Mr. Weil: Complaint to whom?

Mr. Irwin:

Q. To whom did you make complaint?

A. I made complaint to Mr. Campbell, the foreman for James L. Stewart, both by telephone and in person.

Mr. Weil:

Q. What did you say he was?

A. He was foreman for James Stewart on the work.

Mr. Irwin:

Q. Was the trouble remedied after your complaints?

A. No, sir.

Q. When did this dropping of material on the roof cease?

A. Well, not finally until they got to the top of the wall.

Q. I believe I did ask you before, but I will ask you again: What was the past part of the building of the Rosenbaum building that was finished?

A. The side next to the Duquesne Theatre.

Q. How much was that finished behind the rest of the building?

A. I don't remember the exact time. It was quite a little while behind the other work.

Q. Well, could you give us an idea?

A. Well, I should say three or four weeks.

61 Q. Mr. Steen, you say you had charge of the repairing of the Duquesne Theatre and the furnishings, etc.?

A. Yes, sir.

Q. Did you check over the bills that were paid?

A. I did, yes, sir.

Q. How were they paid? I don't mean quite that, but did you issue any certificates?

A. I did, yes, sir.

Q. Did you pass on the question of whether the bills were prope and reasonable?

A. I did, yes, sir.

Q. Were you sufficiently acquainted with the prices of material and labor, and so forth, to enable you to say whether or not the bill were reasonable?

A. Yes, sir.

Q. I will ask you whether the bills that were paid by Mr. Jackma for the repairing of the theatre and the furnishings, and so forth, a certified by you, whether those bills were reasonable?

A. They were.

Q. Does that apply to all that was paid?

A. Sir?

Q. Does that apply to all the bills that he paid for them?

A. To all the bills, yes, sir.

Q. Who were the general contractors for the repairing of the the atre, Mr. Steen?

A. W. D. Beatty was the general contractor.

62 Q. Now, what work was done by the W. D. Beatty Com pany, either by itself or sub-contractors?

A. Well, they did all of the carpenter work, and under them th plastering and the electric wiring.

(Paper shown witness.)

Q. Just to refresh your recollection, I show you the bill of th William D. Beatty Company, and just ask you to state the genera work that they did, either by themselves or by sub-contractors. I mean just the general character of the work, Mr. Steen. I don't car to go into the details just now.

A. The general character of the work was the carpenter work which included the mill work, lumber, stair work; and as sub-con tractors under them, the plastering and the electric wiring.

Q. Did they have charge of the roofing?

A. No, sir.

Q. Who had charge of that?

A. The Brasner & Dinger Company.

Q. That was not a sub-contract?

A. No, that was separate.

Q. Then they handled the electric lighting, did they—I mean Beatty?

A. They handled that as a sub-contractor.

Q. And all of the carpenter work?

A. And all of the carpenter work, mill work.

Q. Did they have the marble work?

A. And the marble work, yes, sir.

63 Q. Did they fix up the stage?

A. Yes, sir, they did all that work.

Q. And the plastering?

A. Yes, sir.

Q. Did they handle the painting?

A. No, sir.

Q. Was all the work done by W. D. Beatty & Company in the theatre occasioned by the removal of the wall?

A. Yes, sir. Well, not quite all. There are one or two items there that in auditing the bills I checked off.

Q. But aside from one or two items which you have called attention to, the rest was all occasioned by the removal of the wall?

A. Yes, sir.

Q. Was the work done there by the W. D. Beatty Company, leaving out these few small items, a necessary work, Mr. Steen, to replace the building?

A. It was.

Q. I will ask you whether or not the work done by Beatty & Company, leaving out these small items, was made necessary by the removal of the wall?

A. Yes, sir.

Q. How much was paid to W. D. Beatty & Company for that work?

Objected to, as incompetent, irrelevant and immaterial.

Here Court adjourned to meet Tuesday, March 20th, 1917, at 9.30 o'clock A. M.

64 Tuesday Session.

And now Tuesday, March 20, 1917, the hour of 9.30 o'clock A. M. having arrived, Court met pursuant to adjourment.

JAMES T. STEEN, recalled, testified as follows:

Mr. Weil: The further objection is made to the question propounded to the witness as to the amount of this expenditure, the witness having testified that the expenditure was occasioned solely and wholely by the removal of the wall, and therefore not by any charge or act of negligence on the part of the defendant, that it therefore could not be relevant or competent under the allegations of the declaration as to the charge of negligence or want of due diligence; there being no evidence before the Court at this time that there was any such negligence or want of due diligence; and until such evidence is introduced, proof of damage cannot be introduced. But when the proof of damages is introduced, it must be for something occasioned by the want of due diligence and negligence, and not solely from the removal of the wall. But if further objection is made to this question for the reason that if there was any negligence on the part of the con-
65 tractor in the method and manner in which he performs his work, or any want of due diligence or the exercise of proper care, then and in that case no recovery can be had against the defendant for negligence or want of care or due diligence on the part of an independent contractor; the declaration in this case, or the Statement of Claim, combining two separate and distinct causes of action. The one the damages suffered from the removal of the wall under the

claim that the defendant is an insurer against the loss by reason of the performance or the prosecution of his right, as we contend, guaranteed under the Statute. The Court has ruled that question—that there is no such liability, but the recovery must be, if at all, exclusively upon the ground of a showing of negligence or want of due care. As to that phase of the matter, no recovery can be had against the defendant, but if there is any cause of action it must be against the contractor alone.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

66 JAMES L. STEWART recalled.

Mr. Weil:

Q. I asked you yesterday as to whether or not you had a written contract for the performance of the work.

Mr. Irwin: If Your Honor please, is my case to be interrupted at the pleasure of counsel on the other side?

Mr. Weil: I reserved the right on cross-examination of Mr. Stewart yesterday to have this paper produced, otherwise we would have waited then for a few minutes until the contract was brought in.

Mr. Irwin: It is objected to. I object to the witness being examined at this time.

By the Court: Assuming that the contract when presented will disclose the fact that the Rosenbaum Company retained no control whatsoever over the subject matter, nevertheless, in its application to this branch of the case, I will sustain the objection.

To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

67 JAMES T. STEEN recalled.

Mr. Irwin:

Q. How much was paid to W. D. Beatty & Company for the work?

Counsel for defendant renews the various objections heretofore made to this question.
Objections overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

Q. In order to answer that question, Mr. Steen, I show you the bills of William D. Beatty & Company, to refresh your recollection.

Mr. Weil: I object to this.

Q. Can you answer this question without looking at these papers

Mr. Weil: I object to this question, the witness having testified that he simply approved the bills, and did not make the payments.
Mr. Irwin: They were made on his certificate, he testified.

By the Court:

Q. Did you make the payments?
A. No, sir.
Q. You did not?
A. No, sir.

68 Mr. Irwin:

Q. Mr. Steen, you have testified, I believe, that you inspected the work performed by this contractor among the other work there?
A. Yes, sir.
Q. Did you pass on and approve their bills?
A. I did.
Q. Did you issue a certificate to W. D. Beatty & Company for the payment of their bill?
A. Yes, sir.

Mr. Irwin: I offer to show by this witness the amount of the bill of W. D. Beatty & Company, as certified to by the witness on the stand, to be followed by proof from the owner that payment was made in accordance with this certificate.
Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial, and further objected to, for the reason that the payment of this bill is no evidence of the amount thereof, the payment of which was occasioned by the negligence or want of care on the part of the defendant, further objected to for the reason that the defendant would not be liable therefor, the negligence, if any, being that of an independent contractor.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

69 A. Without having the figures before me, it was fourteen and one or two hundred dollars, something like that.
Q. Can you, by referring to the figures before you, give the exact amount?
A. No, I don't know that I could.
Q. Well, look and see whether you can give the exact amount.
A. $14,024.24.

By the Court:

Q. How much?
A. $14,024.24.
Q. Twenty-nine dollars, isn't it?
A. Twenty-nine dollars, I beg your pardon, the figures are indistinct.

Mr. Irwin:

Q. Now, I believe you stated yesterday there were included in that bill some small items that were not occasioned by the removal of this wall. I will ask you whether you have taken those out in giving this amount?

A. That fourteen thousand?

Q. Yes.

A. No.

Q. I will just ask you to look and see (showing paper to witness).

A. No, that is not taken out. Those deductions amounted to $270.80.

Q. Which leaves a net——

A. $13,758.64.

70 Q. Mr. Steen, I believe you had a contractor working there of the name of Metzger ond Kaufmann?

A. Metzkes & Kaufmann.

Q. What did they do?

A. Decorators.

Q. You mean the decorations inside of the theatre?

A. Yes, sir, ceiling and wall decorations.

Q. Was that necessary to be done?

A. Yes, sir.

Q. Was the re-decoration of the theatre which was done by Metzkes & Kaufmann—was the necessity for the re-decoration of the theatre—caused by the removal of the wall?

A. Yes, sir.

Q. Did you pass on the bill of Metzkes & Kaufmann, to determine whether or not it was reasonable?

A. Yes, sir, I did. That was done by contract with Metzkes & Kaufmann. We took bids on it—several bidders.

Q. Speak out.

A. We took bids from several bidders. They did the work by contract; they were the lowest bidders.

Q. Mr. Steen, did the water coming into the theatre that you described yesterday have any effect on the decorations of the theatre?

A. Yes, sir.

Q. How was that?

A. It saturated the plastering and stained the decoration that had been done—required it to be done over in places.

Q. Did the water coming through from the roof affect any considerable part of the walls of the theatre?

71 Objected to, as leading.

Objection sustained.

Question withdrawn.

Q. Mr. Steen, just state what part of the theatre walls were affected by the water coming through from the roof.

A. The side wall, the new party wall, and the ceiling adjacent to it.

Q. How large a part of the ceiling?

A. Oh, there were several occasions. On one occasion it was a certain portion, and on another occasion another portion. On one occasion it took a section of the side wall probably ten or twelve feet wide and running out on the ceiling eight or ten feet. Another occasion there was a spot over in the centre of the auditorium ceiling, not a very large spot. Another occasion was a leak came through back towards the boxes, covering probably seven or eight feet on the side wall and running out six or seven feet on the ceiling.

Q. Did you issue a certificate to Metzkes & Kaufmann for this work?

A. I did.

Q. What was the amount of that certificate?

Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial; and further objected to for the reason that there has been no proof of negligence or want of due care introduced in this case. Third, objected to for the reason that the witness has testified
72 that they were incurred on account of the removal of the party wall, and if any part thereof was occasioned by negligence or want of due care, on the part of the defendant, it does not appear. Fourth, objected to for the reason that if any amount was occasioned by the negligence of the contractor, it could not affect the defendant in this action.

Objection overruled.

To which ruling of the Court counsel for defendant excepts.

Exception allowed and bill sealed.

(Paper shown witness).

Mr. Irwin:

Q. If necessary to refresh your recollection, you will look at the papers before you.

A. $735.

Q. Mr. Steen, who did the painting of the theatre?

A. A man named Kurner.

Q. What work did he do?

A. He painted the new and old woodwork, the new wainscoting on the party wall and around the boxes and the old woodwork, not including the floors, to match the new painting; and the front of the theatre.

Q. What?

A. The front of the theatre building. There was new brick work built into the old brick work where it had been torn down to admit of the building of the party wall. That, of course, showed
73 up new and the other part showed old. It was necessary to paint the entire front of the building.

Q. Was the work done there by Mr. Kurner, the painting done by him, occasioned by the removal of this party wall, Mr. Steen?

A. Yes, sir.

Q. Did you pass on his bill?
A. I did.
Q. Was that bill reasonable?
A. Yes, sir, I considered it so.
Q. I would ask you what amount you certified in favor of M. Kurner for the payment for that work?

Mr. Weil: That is objected to, for the same reasons as given in the objection to the previous question.
By the Court: We might as well understand each other. That on this line of examination your objection stands as to all questions and the same ruling is made, by the Court.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. I think the amount is $885, but I will refresh my memory—(consulting paper)—$887.

By the Court:

Q. What was $887?
A. Kurner, painting.
Q. Painting?
A. Yes, sir.

74 Mr. Irwin:

Q. Did Taylor & Dean do any work there, Mr. Steen?
A. Yes, sir, they repaired the fire escapes at the front and rear of the building both where it was damaged by reason of the building of the party wall. They also did a lot of other repair work to the skylight—to the fire escape—that was called for by the inspectors.
Q. That hadn't anything to do with the party wall?
A. That hadn't anything to do with the party wall.
Q. Have you made a division of that, and can you state what amount of their work was made necessary by the removal of the party wall?
A. Yes, sir.
Q. I would ask you what amount of their bill which you certified to was made necessary by the removal of the party wall?

Mr. Weil: This is objected to, for the same reasons stated in the objection to the prior question.
By the Court: Which item have you reference to?
Mr. Irwin: Taylor & Dean.

By the Court:

Q. Are you able to answer that question?
A. I am, yes, sir.
Q. You are?

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A. Yes, sir.
Q. You may answer it.

41½ To which ruling of the Court counsel for defendant excepts. Exception allowed and bill sealed.

A. $66.50.

Mr. Weil: We make the same objection to all these questions.

Mr. Irwin:

Q. Did the Iron City Heating Company do any work there?
A. Yes, sir.
Q. What work did they do?
A. They restored all of the steam pipes along the side of the building next to the party wall that had been taken down and re-connected them with the radiators, and re-finished the radiators on that side.
Q. Was the work which they did there, Mr. Steen, made necessary by the removal of the party wall?
A. It was.
Q. Did you pass on their bill?
A. I did.
Q. Will you state whether or not it was a reasonable price?
A. I so considered it, yes, sir.
Q. What amount did you certify for that work in favor of the Iron City Heating Company?

75 Mr. Weil: The same objection as to the prior questions.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. $152.50.
Q. Did Weldon & Kelly do any work there, Mr. Steen?
A. Yes, sir, they did the plumbing.
Q. What was that, what was necessary to be done?
A. The plumbing of the dressing rooms which were on that side of the theatre had to be done over again, and a lot of sewer work. The sewers had been broken by putting in the supports there.
Q. Was the work which they did there rendered necessary by the removal of the party wall?
A. It was. They did some additional work there that was taken off of their general bill, for some work in other parts of the building.
Q. Did you certify as to the correctness of their bill?
A. I did, yes, sir.
Q. Will you state whether or not the price charged by them was reasonable?
A. It was.
Q. What was the amount of their bill as certified to by you, Mr. Steen, made necessary by the removal of the party wall?

Mr. Weil: The same objection to this as to the prior questions.

Objection overruled.

To which ruling of the Court counsel for defendant ex-
76 cepts.

Exception allowed and bill sealed.

A. Their total bill was $751, and of that amount there was $50 worth of work that we had done that was not connected, or caused by the building of the party wall.

Q. And that left an amount of what sum?

A. $701.

Q. Just give the exact amount.

A. I think there was some cents. Well, that was the amount of the certificate, $751.19.

Q. And the amount properly chargeable to this wall would be how much?

A. $701.19.

Q. What work was done, Mr. Steen, by Boggs & Buhl?

A. Curtain hangings.

Q. What was that?

A. That was at the boxes, the hangings of the boxes, and brass poles, and so on.

Q. Was that work made necessary by the removal of the party wall?

A. Yes, sir.

Q. What amount did you certify to in favor of Boggs & Buhl for that work?

A. I didn't certify that bill. The amount of the bill was $31——

Mr. Weil: Just a moment.

Mr. Irwin:

Q. I will just ask you, before going into that, did you certify to the bill of the Footer Dye Works?

A. No, sir.

77 Q. Do you know what they did?

A. No, I don't.

Q. What work was done there by the General Fire Extinguisher Company?

A. Repairing pipes putting on new sprinkler heads.

Q. Was that work made necessary by the removal of the wall?

A. Yes, sir.

Q. Did you certify to their bill?

A. I did.

Q. What was the amount of the bill that you certified to?

Mr. Weil: The same objection, for the same reasons, as to this as was made to the prior questions.

Objection overruled.

To which ruling of the Court counsel for defendant excepts. Exception allowed and bill sealed.

A. $204.54.
Q. What work was done, Mr. Steen, by Rasner & Dinger?
A. Rasner & Dinger did all of the sheet metal work.
Q. Just describe now what that was.
A. That comprised tin work and galvanized iron work. That is, all repairs to the roof, all of the repairs to the conduits, for the heating system, the basement; repairs to fire doors and to footlight gutter, and so forth.
Q. Was the work done there by Rasner & Dinger made necessary by the removal of the wall?
A. Yes, sir.
78 Q. Did you certify to their bill?
A. I did, yes, sir.
Q. Will you state whether or not the price charged by them for their work was a reasonable amount?
A. Yes, sir.
Q. What was the amount of the bill that you certified to?

Mr. Weil: The same objection as to the prior questions.

Objection overruled.
To which ruling of the Court counsel for defendant except. Exception allowed and bill sealed.

A. Total amount of the bill that I certified to was $2,326.25, but in auditing the bill and segregating it—they did work there which was done not caused by the party wall—amounted to $945.40.
Q. Do you mean the deduction amounts to that?
A. The deductions.
Q. And leaves what, as the net amount?
A. Leaves $1,371.85.
Q. Did you certify the bill of the American District Telegraph Company?
A. No.
Q. Do you know what work they did?
A. They repaired some of the sprinkler system, part of it.
Q. Did you pass on their bill at all?
A. No, sir.
79 Q. Or the Royal Laundry Company bill?
A. No, sir.
Q. Did you pass on the bill of the Pittsburgh Paint Supply Company?
A. No, sir.
Q. Were you there, Mr. Steen, while this work was in progress?
A. Yes, sir every day.
Q. Every day?
A. Yes, sir.
Q. Were you paid for your work?
A. I was.
Q. How much were you paid?

Mr. Weil. The same objection as was made to the former questions.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. $759.

By the Court:

Q. How much?
A. $759.15.

Mr. Irwin:

Q. There is an amount set out in the Statement, Mr. Steen, for cleaning the building and premises. Do you know anything about that?
A. I do not.
Q. Or the purchase of a hose and nozzle?
A. No, sir.
80 Q. Or the whitewashing?
A. No, sir.
Q. How long a time, Mr. Steen, did you take in the work of preparing the theatre?

Mr. Weil: This is objected to.
By the Court: The objection is sustained, as the question is put.

To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Irwin:

Q. How long a time, Mr. Steen, did it require to make the necessary repairs to the theatre that you have testified to?

Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial.
By the Court: The objection is sustained, as the question is put.

To which ruling of the Court, counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Irwin:

Q. Mr. Steen, you have mentioned the fact that water came through from the roof on account of leaks in the roof caused as you described yesterday. Did that cause any delay in the progress of your work in repairing the theatre?

Objected to, as incompetent, irrelevant and immaterial, and as leading.
Objection overruled.
To which ruling of the Court counsel for defendant excepts.
81 Exception allowed and bill sealed.

A. Yes, sir.
Q. To what extent?
A. Well, to a considerable extent. The water coming through saturated the plastering. In one or two cases, some of the plastering fell off. That had to be repaired. Then the redecoration could not be done until after it was thoroughly dried out.
Q. You testified yesterday that you began work in the theatre about the 20th of September?
A. Yes, sir.
Q. Did you work continuously from that time on until you finished it?
A. Yes, sir.
Q. When did you finish the work?
A. Some time about the middle of December, I don't know the exact date.

By the Court:

Q. This was in 1914?
A. 1914.

Mr. Irwin:

Q. Are you able to state, Mr. Steen, how soon you could have completed that work in case you had not been interfered with by water coming through the roof, as you testified to? That is to be answered yes or no.
A. In about one-third of the time.

Objected to.

82 Q. No, I say are you able to state.
A. Yes, sir.
Q. I will ask you within what time you could have finished that work if you had not been interfered with by water coming through the roof?

Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial.
By the Court: I think it has a bearing on the case, if their theory be correct.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. The question is as to the delay on account of water coming through?
Q. Within what time could you have finished the work had you not been delayed?
A. Owing to the water coming through?
Q. Yes.
A. Two or three weeks sooner.
Q. Mr. Steen, you heard Mr. Stewart say yesterday that as origi-

nally contemplated, it was intended to build a wall as high as the Jackman wall by a steel frame that was partially set into the Jackman wall, and then when reaching the top to go out over that wall eight inches and continue a wall from there on up. I will ask you whether that is a practical or feasible method of building a party wall?

83 Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial, as not being involved in or affecting any issue in this case.

Objection sustained.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Irwin:

Q. Mr. Steen, will you state whether or not the time that was taken in making these alterations in the building under the circumstances was a reasonable time or not?

Mr. Weil: Do you mean the alterations he made?
Mr. Irwin: Yes, the repairs he made.
Mr. Weil: That is objected to, for the same reason as given in the objection to the prior questions.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. The work could have been done in very much less time.

Mr. Irwin:

Q. How was that?
A. Provided we would have worked overtime, three shifts.
84 Q. Would that have made any change in the cost?
A. Yes, sir, it would cost a great deal.

By the Court:

Q. But, nevertheless, it could have been done?
A. It could have been done, yes, sir.

Mr. Irwin:

Q. How much more would it have cost, Mr. Steen?

Objected to, as incompetent, irrelevant and immaterial.
Objection sustained.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Q. How long did the men work during the day?
A. They worked the regular time, eight hours I think it is. Eight hours.

Cross-examination.

By Mr. Weil:

Q. I believe you testified yesterday that you went in and made an inspection of the Duquesne Theatre property on June 6th, when there was nothing done except the holes that were made through the wall, and that you next looked at it on July 10th—you went inside—and that at that time the wall was down to 3 feet below the basement wall?

A. With permission, I want to correct that testimony of yesterday in two particulars.

85 Q. Very well.

A. I didn't have my notes with me yesterday. The date of my first inspection was on June 9th.

Q. Instead of the 6th?

A. Instead of the 6th. The second was on July 10th. But in referring to my notes I find that the wall was not down at that date, because I made a second examination of the brick work on that date.

Q. Well then, your correction now is that you were mistaken when you said you went in on June 6th? It wasn't June 6th, it was June 9th?

A. I was mistaken in my recollection of the date. I didn't have my notes with me.

Q. And you were mistaken when you said you were there on July 10th and that the wall was down?

A. I was mistaken in that statement as to the wall being down—not about the dates.

Q. Can you tell us now how you came to make that blunder?

A. I simply didn't have my notes, and it was my recollection I testified to.

Q. Well, you testified very positively. How did you come to fix those dates without your notes?

A. It was simply a matter of recollection, that was all.

Q. Those dates were quite important, weren't they?

A. I presume.

Q. The fact that whether or not that wall was down at that time was quite important, wasn't it?

A. It may be.

Q. As showing how long a time they took to rebuild it?

A. Maybe.

86 Q. And you stated then without any qualification—so as to be fair, I want to read you your testimony:—You were asked;

"Q. Mr. Steen, did you at any time make an inspection of the Duquesne Theatre property while the Rosenbaum building was being constructed?

"A. I did, yes, sir.

"Q. When did you make such an inspection?

"A. The first inspection I made was on June 6th, 1914.

"Q. At that time, had anything been done toward tearing down the wall?

"A. No, there were some holes through the wall of the Duquesne Theatre at that time.

"Q. You mean holes down along the basement line?

"A. Down about the top of the basement, yes, sir, just above the basement.

"Q. When did you next look at the wall?

"A. On July 10th.

"Q. What was being done at that time with relation to the Duquesne wall, if anything?

"A. On July 10th, the wall of the Duquesne Theatre was down, torn down to a distance of about 3 feet below the top of the basement wall.

"Q. That is, the brick wall was all down?

"A. The brick was entirely down, and about two to three feet of the basement wall."

Now, you so testified yesterday, didn't you?

A. I did.

Q. Now, what notes did you refresh your recollection from?

A. The notes that I made after each inspection.

Q. Have you those notes here?

A. I have.

87 Q. Well now, referring to those notes, so that we may have our dates accurate this time, and not be like the man who said if he had some ham he could have some ham and eggs if he had the eggs, are you prepared now to say positively when your last inspection was made—the date?

A. Yes, sir.

Q. Well, give it to us.

A. On the 10th day of July, 1914.

Q. All right now, on the 10th day of July, what did you find as to the wall?

A. Well, I will just read the note——

Q. No, I don't want you to read the note. You may refresh your recollection from the notes and then tell us. What did you find as to the wall on the 10th of July?

A. I made the inspection in the company of Mr. Golden, of Golden & Crick. I found my opinion of the brick work confirmed as to the examination——

Q. Never mind. I am asking you the question as to what you found as to the wall being standing.

A. As to the wall being standing?

Q. Yes.

A. I am just reading you what I found.

Q. I don't want you to read. I want you to refresh your recollection——

Mr. Irwin:

Q. Just look at it and tell him.

A. I found the brick work confirmed my impression of it as I made the inspection on the ninth of June.

Mr. Weil:

Q. Well, was the wall standing or wasn't it?
A. Surely; it must have been standing in part, anyhow.
Q. Wasn't it standing in whole?
A. That I don't know.
Q. Had a single brick been taken off the top of it?
A. I couldn't say.
Q. Don't you know the wall was not disturbed for ten days or
o weeks afterwards?
A. I don't know.
Q. And your notes don't show?
A. My notes don't show, except that I examined the brick work on
at date.
Q. You don't know when they commenced to take down the wall?
A. I do not.
Q. Now, on July 10th, when you went into the property was there
y shoring being done or had been done up to that time?
A. On July 10th?
Q. Yes.
A. Yes, sir, there were some beams through the walls.
Q. There was some shoring, then? Some work had been done on
e shoring up to that time?
A. Yes, sir.
Q. Do you know how much?
A. I do not.
Q. You don't recall that?
A. No, sir.
Q. Now, that was the last inspection, if I understand you cor-
ectly, that you made of that interior, until after the wall had been
put up and you went in there in September?
9 A. That is the last inspection that I made officially.
Q. And you went in in September employed by Mr. Jack-
nan to do certain work on the interior?
A. I did.
Q. That is correct, isn't it?
A. Correct.
Q. I find among the papers from which you refreshed your recol-
ection the bills of Mr. Beatty, for example, which include the sub-
ontracts, as you testified, with the Electric Company and others.
Now, in the Electric Company there is an itemized statement of the
ork which they did, is there not?
A. An itemized statement?
Q. Yes.
A. Yes, sir.
Q. It is attached to the Beatty bill. And in that, for example,
mong other items, is an item for a certain number of lamps, and
or a cast bronze fixture for the outside made to match; for brackets,
icket office, and various other items of similar character, are there
ot?
A. Yes, sir.

Q. An item for a main—switch-board, as per contract, $300 And a panel board and fuse, panels as per contract price; and si pairs of No. 12 border light cable, and other items of that characte that you recall, do you not?

A. Yes, sir.

Q. This electric work was done in general overhauling of th whole system in the theatre, wasn't it?

A. It was.

90 Q. And covered the electric apparatus and appliance throughout the theatre?

A. Throughout the theatre.

Q. Including also the front of the theatre, certain signs with elec tric lights, and so forth, there, as well as on the interior.

A. Yes, sir.

Q. The same was true of the bill of, or sub-contract, of Mr. Dunn was it not—the plaster and cement work?

A. Yes, sir.

Q. That was throughout the theatre.

A. No, it wasn't throughout the theatre.

Q. What?

A. No, it was only the parts that were damaged that were plastered and the new wall.

Q. But wherever that was in the theatre, he did the work, and not exclusively upon the side wall that had been removed?

A. Not exclusively; partly on the ceilings where they had been damaged.

Q. Did you put new floors throughout the building?

A. No, not throughout the building.

Q. Where did you put them?

A. We put new floors on the balcony and galleries, where they were torn up, and we put a new floor on the stage, which was badly damaged.

Q. And the bills in here are included for that?

A. Yes, sir.

Q. There is a bill here for underwriters' inspection?

A. Yes, sir.

91 Q. And for permits?

A. Yes, sir.

Q. And water bills?

A. Yes, sir.

Q. For electric light during the time of the repair and reconstruction?

A. For the current to give light, yes, sir, to do the work by.

Q. I say for the electric light that was used by you during this period when you were re-constructing?

A. Yes, sir.

Q. That amounted to, you have shown here, about $112.15?

A. Yes, sir.

Q. The Duquesne Electric Company?

A. Yes, sir.

Q. In another one of the Beatty bills, there is another electric light bill estimated at $125?
A. Yes, sir.
Q. That was of the same character?
A. Same character.
Q. To furnish you with light while you were doing your work inside?
A. Yes, sir.
Q. Then in one of the bills I observe items for fastening seats and making fire doors.
A. Yes, sir.
Q. That was included?
A. That was included on some of the fire doors and some of the seats that had been loosened up, not for all the fire doors or all the seats.
92 Q. No, it states just what the items are.
A. Yes, sir.
Q. And an item, for example, of $85 for two double man-holes in the alley, estimated $85?
A. Yes, sir, they were broken down.
Q. And those were included?
A. Yes, sir.
Q. There is an item of putting a new roof on the water tower?
A. Yes, sir.
Q. That was that water tank on the top, was it?
A. The water tank on top of the roof.
Q. What are these holes that were cut through the wall of the Duquesne Theatre—mason's time, what was that?
A. That is eliminated in part of that elimination of that bill of W. D. Beatty's. Those were——
Q. Well, in other words, then, you have not included that in your bill?
A. No, sir.
Q. That was deducted?
A. That is part of the deduction on the bill.
Q. Well then, as long as it is deducted, we need not go into it.
A. Yes, sir, deducted.
Q. Now, these brick contractors, Lovett, was that deducted or is that included?
A. That is included.
Q. What is that for?
A. That is for repairing the brick work at the front and repairing work down in the basement where the supports had been interfered with—the supports to the galleries, auditorium and floor.
93 Q. What is this sawdust for, 6 bags of sawdust and bags?
A. That is to lay the dust when they clean the place up.
Q. That was included?
A. Yes, sir.
Q. And here are some locks and night latches, from the Ft. Pitt Hardware Company; hinges, bolts, butts, stove and stove bolts. Those are all included?

A. Yes, sir, they are all for dressing room doors and box doors and so on.

Q. Have you the contract under which Mr. Beatty did this work?

A. No, there wasn't any contract, other than that Mr. Beatty did that work on time and material and ten per cent.

Q. Why, your certificate states, "This is to certify that under the terms of the contract dated September 19th, 1914." There was some contract under that date?

A. There may have been a paper to that effect. It wasn't a regular uniform contract or anything of that kind.

Q. Have you got that paper, whatever it was?

A. I may have it. I haven't got it here.

Q. Will you try to find it?

A. I will try to find it, yes, sir.

Q. Where was this marble work done, Mr. Steen?

A. What work?

Q. The marble work that could be charged for here.

A. In whose bill?

Q. In the Iron City Marble Company's.

A. It was done in the entrance to the gallery on the side next to the Rosenbaum Building. All that marble work was taken out, had to be, removed. And the marble work of the ticket office on
94 that side. Some of the wainscoting in the foyer of the lobby and part of the floors on the lobby. That is where that marble work was done.

Q. And this is for replacing it, is it?

A. Yes, sir.

Q. That had to be taken out when this party wall was put in?

A. Yes, sir.

Q. And this bill of the Iron City Marble Company, which apparently is all for labor, is for re-setting it?

A. Well, it wasn't all for labor. There was some of the marble work broken in taking it out, and some of it broken by weights going on it.

Q. Well, the bill shows the items.

A. Yes, sir.

Q. $229 for labor, and then material? There is one barrel of plaster, three pounds of brass, and ten pounds of wire, 66 cts.; 110 something—I suppose feet—of clear while alabaster tile, and one tread, 7 by 1¾ by 1—2½ by 1¼, $62.37; freight and hauling same. And then an antique border $8.71, and a dollar; cost to us $78.83. All of the bill except that was for labor?

A. Yes, sir.

Q. The bill of the Rasner & Dinger Company is "General new and repair sheet metal work, as directed by Mr. Steen, Mr. Jackman and Mr. Peoples, on the Duquesne Theatre Building." Can you tell us what the new work was?

A. Yes, sir, I can tell you what the new work was.

Q. Just in a general way.

A. Well, we put in a new gutter on the west side of the roof of the Jackman Building.

95 Q. What do you mean by the west side?

A. The side next to Fifth Avenue, the lower side.
Q. The opposite from the Rosenbaum building?
A. Yes, sir.
Q. That is the east side? The Rosenbaum side is the east side?
A. Yes, sir, that we designate the east side. That is on the opposite side.
Q. What else?
A. That we didn't charge you with. That is part of the reduction of that $945. That is one of the items eliminated.
Q. What else was new work?
A. We put some newly covered fire doors, that were not affected by the party wall. That was new work. We repaired some of those same heating ducts on the far side of the building that were out of shape, but not caused by the building of the party wall. Those are part of the reductions. We put a new frame of metal guides and covering around the proscenium arch to meet the requirements of the underwriters. That is not charged, that is eliminated fron that general bill.
Q. Now, I find an item here, "Remove hardwood from old on all shutters, furnish and cover with tin, using old hardware and furnishing new when necessary, on 12 fire shutters."
A. Yes, sir.
Q. That was included in the bill, wasn't it?
A. No, that is part of the reduction, I think.
Q. In the bill of Kurner, of eight hundred and some odd dollars, part of that was for painting all woodwork except floors and gallery, balcony, and first floor, gents' toilet, smoking room, ladies' 96 toilet and dressing rooms in basement, as per contract, $487; painting front Penn Avenue $200.00; painting dressing rooms $175; furnishing fourteen lights, double strength window glass, 1 light of bevel plate glass, and one light of plate glass, and labor, $25.00. All of this bill was charged in the evidence you have given?
A. Yes, sir.
Q. And the bill of the Iron City Heating Company is for general repairs to the heating system?
A. Yes, sir.
Q. And that includes the entire heating system, dosn't it?
A. No, that includes the repair to the work that was damaged. We have another bill from them for repair work.
Q. Well, they wouldn't repair anything that wasn't damaged, would they?
A. Well, that is for that work on that side of the building. The pipes were taken down there and taken away, and radiators disconnected, and we never got the pipes back, we had to buy new pipes, and re-connect the radiators and re-paint them.
Q. This, then, is for the repairs on the heating system on the side of the building caused by the removal of that wall?
A. Yes, sir.
Q. And is for that alone?
A. Yes, sir.

Q. And does not apply to the whole system in the theatre, as I understand you?

A. No, sir.

Q. The $735 is for re-decorating or for decorating the interior of the Duquesne Theatre, as per contract October 8th, 1914, and extra for ornamentation? The first is $635 and the other $100. That is Metzkes & Kaufmann?

A. Yes, sir.

97 Q. Now, that was for the whole interior, was it?

A. That was for the whole interior of the auditorium.

Q. I beg your pardon.

A. The auditorium.

Q. That included the whole auditorium?

A. Yes, sir.

Q. What was that extra for ornamentation, what do you mean by that?

A. We made the contract in two parts. The first contract just took in the plain decoration, without any borders, and the other was for the decorative border work.

Q. The extra for ornamentation was the pretty part?

A. Yes, sir, the pretty part.

Q. In the Weldon & Kelly bill, the greater part of that amount as stated in the bill, is for repairs to plumbing necessitated by changing party wall between theatre and new Rosenbaum building?

A. Yes, sir.

Q. And the amount is given?

A. Yes, sir.

Q. There is also a bill here for connecting three-quarter inch gas line to meter, roughing in for and setting their two bowls marble lavatories in ladies' toilet, extending fire line, connecting water riser and moving pipe out of the way of the electrician, in the basement?

A. Yes, sir.

Q. That is also included?

A. No, sir, there was a reduction made of $50. The ladies' toilet is on the west side of the front. There is a reduction made on that of $50 on the total bill.

98 Q. Well, this bill is $72.26, these items.

A. $72.

Q. $72.26?

A. Well, it was the ladies' toilet work that was eliminated on the bill, whatever that amounts to.

Q. Then, as I understand you, the ladies' toilet part and items for that was cut out?

A. Yes, sir.

Q. And the balance of the bill was charged up?

A. Yes, sir.

Q. And your recollection is that what was cut out was about $50?

A. Yes, sir, it was $50.

Q. And the balance of it, however, was charged in this——

A. In this account.

Q. In this bill that you have rendered?

A. Yes, sir.

Q. What was the total amount paid to you by Mr. Jackman for supervising this work? Was it the amount of the bill you have rendered here?

A. Yes, sir.

Q. $759.15?

A. Yes, sir.

Q. That was the total amount paid you?

A. That was the total amount paid me.

Q. And the whole amount has been charged, as you have testified, in this account?

A. Yes, sir.

Q. And that included all of the professional services that you rendered in the matter?

A. Yes, sir.

99 Q. And that you rendered in connection with all of these repairs that were made on the interior of the theatre?

A. Yes, sir.

Mr. Irwin:

Q. Mr. Steen, you were asked about the bill of—I think it was Rasner & Dinger—no, it was the Electric Light Company people, the Axthelm Electric Company, to put up electric fixtures throughout the theatre?

A. Yes, sir.

Q. Have you charged for those fixtures?

A. Have I charged for them?

Q. Yes.

A. Only some of them.

Q. Well, what ones?

A. Well, the ones that were along the wall on that side originally, bracket lights along that wall and in the entrance going up to the gallery on that side.

Q. You mean the party wall side?

A. The party wall side, yes, sir, and in the ticket office. Now, those were charged for.

Q. And I believe there is no light out front?

A. Yes, sir, there was a cast bronze light out front.

Q. Why did you include those in the bill?

A. They were taken away and destroyed, never brought back. That was an expensive cast bronze fixture outside on the pier next the doorway, and others on the other piers, too.

Q. You mean on the side of the building next to the wall?

A. Yes, sir. The fixture cost $50.

Q. That, you say, was taken away and not returned?

A. Taken away and not returned.

100 Q. What about the fixtures inside of the theatre away from this wall? Were they charged?

A. No, you will find there is four special fixtures in the ceiling that are charged, $120. They are not charged in against the wall.

Q. Now, your attention has been called to the fact that the painting bill covers the whole interior of the auditorium. I will ask you whether that was necessary.

A. Yes, sir.

Q. Why?

A. Just as much as the decoration was necessary.

Q. Well, why, in both of those items, was it necessary?

A. We had to put new wainscoting all along that wall and new woodwork, and new woodwork on the boxes, and we had to paint that, of course, and when we painted that up, the other wouldn't correspond with it in appearance.

By the Court:

Q. What is the size of that building, its frontage?

A. It is about 87 feet front, and about 112 feet deep.

Mr. Irwin:

Q. Would it be possible to do a presentable job by painting only one side of the auditorium and allowing the other to remain?

A. No, sir.

101 By the Court:

Q. Yes, it would be possible, but foolish.

A. He said to make it presentable.

Mr. Irwin:

Q. And that testimony also applies to the decorating?

A. Yes, sir.

102 EDWARD F. JACKMAN, the plaintiff, having been duly sworn in his own behalf, testified as follows:

Direct examination.

By Mr. Irwin:

Q. Mr. Jackman, you are the owner of the Duquesne Theatre?

A. Yes, sir.

Q. How long have you owned it?

A. Since 1889.

Q. I believe your father owned it before you?

A. My father left it to me, yes, sir.

Q. It has been testified here, Mr. Jackman, that the wall on your building next to the present Rosenbaum store was broken through about June 6th, and that the wall was finally built and turned over to you about September 15th. I will ask you whether that is correct.

A. I don't know the exact date, but I think it is in some letter there that the Rosenbaums refused to do any more improving or re-

pairing, and then we took it over from that day, whatever date that was, in that letter.

Q. I think it had been admitted on the record it was about June 15th.

A. September you mean?

Q. September, yes. When the wall was turned over to you, in what condition was the theatre on the inside, Mr. Jackman?

A. Well, it was just the finished—or the plain brick wall, pointed. Just the brick finish.

Q. Had any plastering been done on it?

A. No, sir, no plastering done.

Q. In what condition was your building on the side next to that wall at the time the wall was turned over to you?

A. What condition was our building?

103 Q. Yes.

A. It was in first-class condition.

Q. I mean when the wall was turned over to you.

A. Oh, when the wall was turned over?

Q. Yes.

A. In what condition was the wall?

Q. No, your building. Had it been injured in any way?

A. Oh, yes, it had been dismantled and put out of shape. There wasn't any plastering, and the pap-er mache work on the boxes, and the floors, had to be repaired, and the wires were all cut in a careless way, and it looked as if a cyclone had struck it on that side.

Q. You employed, I believe it has been testified here, Mr. Steen to supervise the repairing of that building.

A. Yes, sir, I turned that all over to him.

Q. And Mr. Steen has testified that he issued certificates in certain amounts to different contractors who did work there. I will ask you whether you made payment according to the certificates issued by Mr. Steen?

A. Yes, sir.

Q. Did you pay all the contractors who did the work there?

A. Yes, sir.

Q. Did you pay them the amounts that have been testified to here by Mr. Steen?

A. I think I did.

Q. Keep your voice up.

A. Yes, sir.

Q. Now, there are one or two items that Mr. Steen did not know about. I will ask you what work was done there by Boggs & Buhl?

104 A. Why, that was taking out, or putting up, draperies in the boxes.

Q. In what part of the theatre?

A. We had to take them all down to get them cleaned. They didn't take the draperies down in the theatre when they dismantled it. They required cleaning and then re-hanging.

Q. And that was what this work was for?

A. What is the amount of that bill, $35 or $40, or something, isn't it?

(Paper shown witness.)

Q. What is the amount of Boggs & Buhl's bill?
A. $31.62.
Q. Did you pay that?
A. Yes, sir.
Q. What work was done by Footer's Dye Works?
A. Footer's Dye Works cleaned the draperies. It had all that brick dust——

Mr. Weil: All this testimony with reference to these bills is objected to, for the same reasons that were stated in the objection as made to the items introduced through Mr. Steen, and we assume the Court will rule the same and let it all be taken under the one objection and the one exception.

By the Court: That is correct.

To which ruling of the Court counsel for defendant excepts. Exception allowed and bill sealed.

105 Mr. Irwin:

Q. You said Footer's Dye Works cleaned these draperies?
A. Yes, sir.
Q. Did you pay their bill?
A. Yes, sir.
Q. What amount was that?
A. $60.00.
Q. What was Footer's Dye Works bill for, Mr. Jackman?
A. For cleaning the draperies and portieres. There wasn't any of those taken down while the wall was being taken down at all.
Q. Was the cleaning of these draperies made necessary by the removal of this wall?
A. Yes, sir.
Q. What work was done by the American District Telegraph Company, Mr. Jackman?
A. Have you their bill? It is pretty hard to remember these items.

(Paper shown witness.)

By the Witness: We have the sprinkler equipment in the theatre for which we pay an insurance or sum each year for a record that is made in case the sprinkler gets out of repair; it rings in the Park Building, on the corner of Fifth & Smithfield, and they send a man down to repair it; and it is a sort of an alarm or a protection in case any of the sprinkler tips would break, and they have certain
106 gauges on the tank that when the water gets down to a certain degree it rings a bell up at the Park Building and they send a man down to find out what is the matter. And that is in regard to that being dismantled on the Rosenbaum side—for the repair of that equipment.

Q. What was the amount of their bill?
A. $35.91.
Q. Did you pay that?
A. Yes, sir.
Q. What work was done by the Royal Laundry?
A. We had white chair covers in the boxes, and that was for laun-
y work for the chair covers in the boxes.
Q. How were they affected, if at all, by the taking out of this
ll?
A. By dust.
Q. Was it necessary to have them laundered?
A. Yes, sir.
Q. What was the amount of their bill?
A. $9.75.
Q. Did you pay that?
A. Yes, sir.
Q. I call your attention to the bill of the Pittsburgh Paint Supply
mpany, and ask you what that was for.
A. Well, under the chairs in the Duquesne Theatre we have a
inted floor with carpet down the aisles. This is a dark brown
int to paint the floors. When the Rosenbaum wall was taken
wn, or when the Jackman wall was taken down, they ran a pas-
sageway for wheelbarrows from the front of the building back
07 to the back, over the stage and over the footlights with wheel-
barrows, and carted some of the brick and materials and
ebris that would gather around there from putting in these big
eedles in the side of the wall, and the dust from the bricks and mor-
r and all that, which in any building goes all through the build-
ng—and so we had to clean those floors and paint them a dark brown
he same as in the rest of the theatre. That is for this paint.
Q. That bill is simply for material?
A. Yes, sir.
Q. Did you pay that bill?
A. Yes, sir.
Q. What is the amount of it?
A. $14.60.
Q. I notice an item in your statement, Mr. Jackman, for cleaning
he building and premises.
A. Yes, sir.
Q. What is that?
A. Well, that is for some people I got in there after the theatre
as turned over to me, after we got through fixing it ourselves—not
hen the Rosenbaums turned it over—to clean the whole thing up.
Q. Was it necessary to have that done?
A. Oh, yes.
Q. Did you pay that bill?
A. Yes, sir.
Q. What is this item for a hose and nozzle?
A. That was for a hose, a section of hose. We have in the Du-
quesne Theatre, fourteen fire plugs, either twelve or fourteen,
08 two and a half inch city pressure. We have a 50-foot sec-
tion of hose on each fire plug with the 22-inch nozzle. They

have since changed them, I believe, to an eighteen. And on the side of the wall, on the east wall, they had one of these, which came in very handy for mixing cement, and Stewart would use that for a cement mixer, and so when we came to get it it was either gone or—so we just got a new one.

Q. What did that cost?

A. I don't know. In the neighborhood of thirty-five or forty dollars, or something. It is pretty hard to carry these things in your mind.

(Paper shown witness.)

Q. I show you a copy of your Statement of Claim, and ask you if that will refresh your recollection as to what it cost?

A. One section of hose and nozzle, $47.50.

Here Court took a recess until 1:00 P. M.

109 Tuesday Afternoon.

And now, the hour of 1:00 o'clock P. M. having arrived, Court met, pursuant to adjournment.

EDWARD F. JACKMAN recalled.

Direct examination resumed.

By Mr. Irwin:

Q. Mr. Jackman, I notice an item here of whitewashing, $25.00. What was that for?

A. That is for the back wall of the theatre fronting on the stage where they took the corner out of the wall and all that sort of thing, dressing rooms. They soiled all the whitewashing and we had it re-whitewashed.

Q. Was that necessary?

A. To leave it in the condition when we first got it. It wasn't absolutely necessary to ring the curtain up or anything, but the stage people liked to have it clean there in the back.

Q. Did you pay that amount?

A. Yes, sir.

Q. Mr. Jackman, what can you say about these various bills that you have testified to as having paid, as to whether or not they are reasonable prices?

A. Well, I instructed Mr. Steen to get the best prices he could get and to get two or three bidders on anything that amounted to anything, and which he told me he did. Mr. Steen is familiar with the different contractors.

110 Q. Mr. Jackman, was this proceeding to build a party wall brought with your consent?

A. No, sir.

Q. Did you ever give your consent to their erecting a party wall?

A. No, sir.

(NOTE.—It is admitted that the proceeding in question, for the erection of a party wall, was commenced and duly prosecuted under the Act of 1895, relating to cities of the second class, and that the terms of the Act were complied with.)

Q. Mr. Jackman, after this party wall was built, was there a proceeding to determine the cost of it?

A. Yes, sir.

Q. Do you recall what amount was fixed as the cost of this wall?

A. In the neighborhood of $50,000, but I can't recall the exact figures.

By the Court:

Q. Cost whom?

A. Rosenbaums.

Mr. Weil:

Q. The total cost?

A. The total cost of the party wall, as I understand it, was in the neighborhood of $50,000.

111 Mr. Irwin: It is admitted that the total cost was $53,874.-20, as determined in those proceedings.

By the Witness: Well, there was a reduction made in that from the original cost of some three or four thousand dollars, thirty-three or four or five hundred dollars.

Mr. Weil: The amount was $53,874.20 as fixed by the Superintendent of the Bureau of Building Inspection.

Mr. Irwin:

Q. I believe you stated, Mr. Jackman, that you were on these premises frequently during the construction of this party wall?

A. Nearly every day.

Q. How was the work carried on on the Rosenbaum Building, with regard to the party wall, in relation to the rest of the building? Was it carried on as rapidly or less so, as yo uobserved?

A. It didn't seem to be carried on the same as the other. It was very, very slowly.

Q. In the height of the walls, did it keep up with the rest of the building or not?

A. I don't think it did, no, sir.

Q. Well, did you see.

A. They came up within twenty or thirty feet, I think, of the theatre, and then continued their steel up, and then followed the steel up at a later period. Do you understand what I mean? They came up with their steel within twenty feet of the wall.

112 Q. Do you mean within twenty feet of the top?

A. No, twenty feet of the side of the theatre, and they finished that up. In other words, the last set of beams were held back for probably two or three weeks.

Q. Then, as I understand your testimony, the steel in the building was set up within——

A. One section.

Q. Within one section of your wall, and then carried up, and your wall was carried up last?

A. Yes, sir.

Q. After they started on that wall, did they work on it continuously in the building?

A. I think they did. After they started laying brick, do you mean?

Q. Yes. Was there any time when they ceased work on it?

A. Yes, I recall that—two or three weeks they didn't do anything on that side at all.

Q. When was that?

A. I think some time in August, the early part of August.

Q. What was the condition of the wall at that time?

A. The wall was down. I think the foundations were in. They were evidently waiting for something. The foreman said they were waiting for the steel or something.

Counsel for defendant now moves the Court to strike out the latter part of the answerfi as not being responsive to the question.

Motion allowed.

113 Q. How long a time did you say that was?

A. Well, two weeks, I would imagine, from my recollection.

Q. Did you at any time make any complaints regarding the progress on this wall?

A. Yes, sir.

Q. To whom did you make those complaints?

A. To the foreman of Mr. Stewart, Mr. Stewart's foreman.

Q. Did you ever speak to Mr. Stewart about it?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in the Duquesne Club.

Mr. Weil: We object to any statements he made to the foreman, and we also object to any statement made to Mr. Stewart as binding upon the defendants here, unless the same was communicated to them.

Mr. Irwin:

Q. Did you ever say anything to Mr. Stewart about the necessity of having this wall completed by September?

Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial, as affecting the defendants here, unless the same was communicated by the witness to the defendants.

By the Court: As I am at present impressed, the objection is overruled.

To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

114 A. Yes, sir.

Q. What did you say to him?

A. Well, I told him he would have to hurry up——

Objected to by counsel for defendant, for the reasons stated in the objection to the previous question.

Objection overruled.

To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

Q. Go ahead.

A. I told him he would have to hurry up with the building, in order to get it done for the beginning of the theatrical season, because if we didn't get the theatre by the time of the opening of the theatrical season, we couldn't lease it.

Q. What do you mean by the beginning of the theatrical season?

A. The first of September.

Q. Why is that important?

A. If you don't get a theatre rented by the first of September, you lose the rent for the whole year, as a general thing.

By the Court:

Q. What did you say? As a general thing?

A. Well, I think it is, generally, with all theatres——

Q. I don't hear you.

A. Yes, sir, if it isn't rented by the first of September, you carry it all year.

115 Mr. Irwin:

Q. Why?

A. Because the different theatrical circuits start their combination companies, their travelling companies, opening in cities like Pittsburgh the first of September, or earlier, and if you don't get in the big circuits the chances are you will lose the rent for the whole year—can't get a tenant.

Q. Have you, since your ownership of the Duquesne, looked after the renting of it?

A. Yes, sir.

(Paper marked Exhibit No. 1 shown witness.)

Q. Mr. Jackman, I show you a copy of a letter dated August 12th, 1914, marked Exhibit No. 1, and ask you whether you know whether the original of that letter was sent or not?

Mr. Weil: This purports to be a copy of a letter signed by Watson & Freeman, addressed to M. Rothchilds, President of the Rosenbaum Company, of which the company, I am informed by the officers, have no knowledge. Now, therefore, even if this letter was sent—

and of course this witness may have some knowledge on that subj
and may not—it would not be any evidence by which to affect the
defendants, unless it were shown that they had received the sam
and it is therefore objected to.

116 Objection overruled.
To which ruling of the Court counsel for defendant e
cepts.
Exception allowed and bill sealed.

A. The original was sent from Watson & Freeman's office.

By the Court:

Q. Do you know it?

Mr. Irwin:

Q. Do you know whether it was sent or not yourself?
A. No, sir.
Q. At the time this wall was being constructed, did you notic
the force of men that was working on this wall, as compared with th
other three sides of the building?
A. Yes, sir.
Q. Well, what can you say concerning the force of men that wer
working on this wall, as compared with the rest of the building?
A. They didn't have as many men on this end of the building a
they did on the others.
Q. Did you ever make any complaint to the Rosenbaum Company
by letter or otherwise, concerning the amount of men that were pu
on this wall?
A. Yes, sir.

Mr. Irwin: The plaintiff offers in evidence Exhibit No. 2, which
consists of a number of letters, as follows:
117 Letter by Mr. Jackman to the Rosenbaum Company, dated
September 8, 1914; Letter from Weil & Thorp, attorneys for
the Rosenbaum Company, in answer to the same, dated Septembe
10, 1914, to Mr. Jackman; A copy of a letter to James L. Stewart,
by Mr. Jackman, dated September 8, 1914, which copy is admitted
to be correct; An answer to said letter by Mr. Stewart to Mr. Jack-
man, dated September 11, 1914.

Mr. Weil: As to these two letters, they are admitted to be cor-
rect, and to have been received and sent, and no further proof thereof
is required; but the admissibility thereof is objected to, as being
incompetent, irrelevant and immaterial, as affecting the defendant.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

Mr. Irwin: Also a letter of September 15, 1914, from Weil &
Thorp, attorneys for the Rosenbaum Company, to Mr. Jackman;

A letter of September 17, 1914, from Mr. Jackman to the Rosenbaum Company;

A letter of September 18, 1914, from Weil & Thorp to Mr. Jackman.

A letter of February 5th, 1915, from Mr. Jackman to M. Rothchilds.

118 Mr. Weil: As to the letter of February 5th, of Mr. Jackman to Mr. Rothchilds, President of the Rosenbaum Company, this is objected to.

Mr. Irwin: I will withdraw that.

(Letters offered in evidence read to the Jury by Mr. Irwin.)

Mr. Irwin:

Q. Mr. Jackman, did you have an opportunity of renting this building on or about September 1st, 1914?

Mr. Weil: We object to that, as incompetent, irrelevant and immaterial, and not an element of damage for which recovery can be had, the alleged damage being too remote, uncertain, speculative and indeterminate; the rule being that if there had been shown any negligence by which the use and occupancy of the premises was prevented, the recovery would be limited to the time during which such use and occupancy was prevented and not for the expectant use and occupancy at some future date.

Objection overruled.
To which ruling of the Court counsel for the defendant excepts.
Exception allowed and bill sealed.

A. I had an opportunity of renting it in July or August, about either the middle of July or the middle of August.

Q. That is, for what period—beginning when?

119 Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial, and not an element of damage; and especially objected to, for the reason that there has been no evidence of negligence or undue delay in the completion of the building.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. Beginning—I first said the first of September, and this was on the stage of the Duquesne Theatre. Do you want me to tell you about the——

Q. You stated that you had an opportunity in July or August to rent this. I asked you, for a period beginning when did you have an opportunity to rent it?

A. Well, September 1st.

Q. That is 1914?

A. 1914.

Q. You stated a while ago that you had had personal charge of the renting of the Duquesne Theatre since what year?
A. 1890.
Q. Has the theatre been rented since that date down to the time of the building of this party wall?
A. Yes, sir, never was idle.
Q. Who was your tenant at the time this party wall was torn down?
A. The Harry Davis Enterprises Company.
Q. And, I believe, he finally paid your rent up to the first of September, 1914?
A. Yes, sir.
120 Q. How long was his term?
A. Five years.

By the Court: Had it expired? Hhat do you mean by the question,—five years in the future?
Mr. Irwin: Five years in the past.
The Witness: He had had it four years and nine months.

Mr. Irwin:

Q. His term expired when?
A. The first of September, 1914.
Q. What rental did you receive from the Harry Davis Enterprises Company for the previous five years?

Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial, and not the measure of damage.

Objection overruled.

To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. $40,000 a year.
Q. Has the theatre been rented since the party wall was built?
A. Yes, sir.
Q. Is it rented now?
A. Yes, sir.
Q. For what period?
A. For five years——

Mr. Weil: I object to that.
121 By the Court: The objection is sustained.
Mr. Irwin: The purpose I had in mind was to show the rental both before and after.
By the Court: The objection is sustained.

To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Irwin:

Q. Did you succeed in renting your theatre during the year beginning September 1st, 1914?

Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. No, sir.
Q. Did you receive any rental from your theatre during that year?
A. No, sir.
Q. Did you make an attempt to rent it?

By the Court: What year?

Mr. Irwin:

Q. During the year beginning September 1st, 1914, and ending September 1st, 1915?
A. No, sir.

122 Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

Mr. Irwin:

Q. To get it clear, I ask you now whether for the year beginning September 1st, 1914, and ending September 1st, 1915, you received any rental for your building?
A. No, sir.
Q. Was it occupied by any lessee during that time?
A. No, sir.
Q. Did you make any attempt to rent it during that year?

Mr. Weil: That is objected to, for the same reason.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. Yes, sir.

Mr. Irwin:

Q. Mr. Jackman, while the Rosenbaum building was under construction, were you at any time up on the roof of your building?
A. No, I don't remember being on the roof of the building, of our building. I am getting a little old to climb roofs.

123 By the Court:

Q. What is that?
A. I was not on the roof of the building, but I was in the Methodist book concern looking right down on it, it is next adjoining it.

Mr. Irwin:

Q. The Methodist book concern is next to your building?
A. Yes, sir. I would go and take the elevator and go up to the fifth or sixth story and get a clear view of it.

Here Court adjourned, to meet Wednesday, March 21, 1917, at 9.30 o'clock A. M.

124 Wednesday Session.

And now Wednesday, March 21, 1917, the hour of 9.30 A. M. having arrived, Court met, pursuant to adjournment.

EDWARD F. JACKMAN recalled.

Mr. Irwin:

Q. Mr. Jackman, are you acquainted with the rental value of other theatres in the city of Pittsburgh?
A. Yes, sir.
Q. I will ask you what you consider a fair rental value for the Duquesne Theatre?

Mr. Weil: At what time are you asking about?
Mr. Irwin: In the year 1914.
Mr. Weil: That is objected to, as incompetent, irrelevant and immaterial.

Objection overruled.
To which ruling of the Court counsel for defendant excepts.
Exception allowed and bill sealed.

A. I consider $40,000 a fair rent.

Mr. Irwin:

Q. Mr. Jackman, what was the condition of the eastern side of your theatre next to the Rosenbaum property before this wall was torn down?
125 A. Why, it was in first-class condition, the same as the rest of the theatre.
Q. In making these various repairs that you have testified to as having made, in what condition did they leave the eastern side of your theatre, in relation to its condition before the tearing out of the wall?

Objected to.

By the Court: I do not understand the question.

Question withdrawn.

Mr. Irwin:

Q. Did these repairs that you made put the theatre back in the same condition as it was before?

Mr. Weil: This is objected to, as incompetent, irrelevant and immaterial. I do not object to the form of the question.

By the Court: I will sustain the objection, unless you add to the question "or better."

Mr. Irwin:

Q. Did these repairs that you made put the theatre back in the same condition it was before or better?

A. Well, it put it back in the same condition it was before, and by putting it back the new electrical equipment——

126 By the Court:

Q. Are you speaking of all the repairs now?

A. Well, I would say it put it back in the condition that it was, because this new electrical appliances only gave us electric current, the same as ours did.

Cross-examination.

By Mr. Weil:

Q. Naturally some of the new stuff that was put in would be a little better than the old stuff that was taken out?

A. I would say that.

Q. And that would apply to some of these appliances that were put in?

A. At a later date?

Q. Of course, it was re-decorated?

A. The same as it was before, absolutely.

Q. But it was new decoration?

A. Yes, sir.

Q. The old decorations that were there had been in how long?

A. Four years and nine months.

Q. Four years and nine months?

A. Yes, sir, I renewed the whole theatre before Mr. Davis took it.

Q. But I say it had been there about four years and nine months?

A. Yes, sir.

Q. And you re-decorated it, and you would naturally expect that to last four or five years, wouldn't you?

A. Yes, sir.

Q. Now, I believe you testified yesterday that you did not consent to the erecting of this party wall; that the proceedings were taken,

and you had nothing to do with it, after the notices were served upon you?

127 A. I went around when they were establishing their boundary lines, and I told them, the committee, that the——

By the Court:

Q. I wish you would answer the question.

(Question repeated.)

A. No, sir, I don't remember of consenting.

Mr. Weil:

Q. When these notices were served upon you of these proceedings, what did you do? Did you attend any of the meetings?

A. Yes, sir.

Q. Which ones did you attend?

A. The first meeting, I think, was along in March, or the early part of the year; it was a very cold morning, and they met down at the theatre, and I went down there and told them—I attended that.

Q. That meeting was for the purpose of establishing the line, wasn't it?

A. Yes, sir.

Q. That was for the purpose of making the survey, as they called it?

A. Yes, sir.

By the Court:

Q. That was a meeting with the City authorities, was it?

A. Yes, sir.

Mr. Weil:

Q. That was there the City engineers, or someone connected with the City, ran the line so as to establish the line between your

128 property and the property under lease by the Rosenbaum Company?

A. Yes, sir.

Q. And you were there at that time?

A. Yes, sir.

Q. And I suppose pointed out to them what you understood to be the——

A. No, I didn't point out anything at all; I didn't stay at all.

Q. You were there?

A. I was there, yes, sir.

Q. Did you have any communication—make any communication to them at that time?

A. No, I don't remember saying anything to them; only that they knew their boundary lines and they knew what was due them, and all that sort of thing, and I knew that they wouldn't do anything but what was right.

Q. You made no objection as to the line that was established as being the proper line?

A. No, I didn't make any objection.

Q. Now, the next notice that was served upon you—I don't care for the dates—did you attend that meeting?

A. Well, where was that? In your office?

Q. No, that was in May—I don't know where it was held. May 29th, I think it was.

A. Well, where was that meeting, Mr. Weil?

Q. Well, I think that was on the property. Wasn't that a resurvey of the same property?

A. Well, I can't recall that. I wouldn't say whether I was there or not. Perhaps I was.

129 Q. And then did you attend any other meeting?

A. I was called to your office one day and I went up there, and the Rosenbaum representatives were there, as I recall it, and I repeated what I said down below——

Q. Now, just a moment. Who else was there? Was Mr. Dies there?

A. I don't remember Dies being there.

Q. Well, was this in regard to the Bureau of Building Inspection?

A. No, I don't think it was. I think it was in regard to the building lines or something, the same as this meeting we first had.

Q. I am talking about the proceedings on the part of the building inspectors in establishing the party wall, and so forth. Did you attend the meeting subsequently when they fixed the cost of the——

A. Of the wall?

Q. Yes, of the wall.

A. Oh, yes.

Q. When was that now? The date, about? I don't care for the exact date.

A. That was after the building was finished. We met around in Inspector Dies' office to determine the price of the wall—that meeting was for, I think.

Q. The first one, to refresh your recollection, apparently was in February of 1916?

A. No, not 1916. That was before the building was built. 1914, wasn't it?

Q. I am talking now of after the——

A. Oh, the building was finished.

Q. After the building was finished.

A. Yes, sir.

130 Q. This was the cost?

A. Yes, sir.

Q. That would have to be after the building was finished?

A. Yes, sir.

Q. Did you attend that meeting, some time in the first part of 1916, after Stewart had rendered his "Revised Cost of Jackman Wall as agreed upon at Mr. Dies' Office on January 21st, 1916; Present,

Mr. Dies, Mr. Crawford, Mr. Steen, Mr. Jackman, Mr. Harbison, and Mr. Myer." Were you present at such a meeting?

A. Yes, sir.

Q. And the cost of that wall was then and there agreed upon, was it not?

A. Yes, sir.

Q. At that meeting?

A. Yes, sir, what the wall was to cost, in case I ever used it.

Q. Certainly, I mean what this wall was to cost. That is, what it had cost, and if you used it what the cost of it was, to be figured out in the event that you subsequently used it?

A. I attended that meeting.

Q. Now, were those the only two meeting- that you can recall having attended?

A. I only recall one meeting in your office. You were not present.

Q. But that was with reference to another matter?

A. Yes, sir.

Q. I am talking now about the meetings with Mr. Dies.

A. I think we had another meeting there. Did we?

131 Q. I don't know, I am trying to get the facts.

A. Well, I recall that meeting.

Q. Well, that was one meeting.

A. Yes, sir.

Q. You say you have an indistinct recollection that there was perhaps a meeting in regard to the same matter?

A. I am not sure.

Q. What?

A. I am not sure, but I think——

Q. That is all right. But with the exception of those meetings in regard to the cost of the wall, and the first meeting down on the premises where they were surveying the line that you have described—those are the only meetings that you can recall?

A. Those are the only ones that I can recall now.

Q. And you don't think you attended any other?

A. I don't think so now.

(Paper marked Exhibit "A" shown witness).

Q. I show you a paper, Mr. Jackman, marked for identification Defendant's Exhibit "A", produced by your counsel, and ask you if you received those notices?

Objected to, as not cross examination.

Objection overruled.

To which ruling of the Court counsel for plaintiff except.

Exception allowed and bill sealed.

132 A. Yes, sir.

Q. Did you receive them at about the time they bear date?

A. I received them in time to attend the meeting. Is that what you mean?

Q. Well, of course, that would naturally follow.

Counsel for defendant offers in evidence Exhibit "A."

Objected to, as immaterial and irrelevant; and objected to further for the reason that this is not the time for the defendant to offer its papers in evidence.

Mr. Weil: It is part of the cross-examination.

Objected to, as before.
Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.
(Paper marked Exhibit "B" shown witness).

Mr. Weil:

Q. I show you a paper, marked for identification Defendant's Exhibit "B," produced by your counsel, and ask you if you received that notice, that letter, at about the time that it bears date?

133 Mr. Irwin: That is objected to, for the same reason as before, as being incompetent, irrelevant and immaterial, and not proper cross examination, and also that the paper is not a part of the party wall proceeding.

Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

A. May 21st—I must have received that the next day.

Mr. Weil: I offer Exhibit "B" in evidence, in connection with the cross examination.
Mr. Irwin: That is objected to, as not part of the cross examination, and as incompetent, irrelevant and immaterial.

Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Weil: I will ask the stenographer to mark this paper—(indicating)—Exhibit B-1, which I will pin to Exhibit "B," which has been produced by counsel as being the letter referred to in the letter already identified by the witness as Exhibit "B."

Mr. Weil:

Q. I would ask you if that Exhibit B-1 is the letter referred to in Exhibit "B," in the last paragraph.
A. Those were both written on the same day?
134 Q. Yes.
A. Well, I would say I received those.

Mr. Weil: I offer in evidence Exhibit "B" and Exhibit B-1.
Mr. Irwin: Exhibit B-1 is a notice to William Stanton. Any notice he might give to William Stanton would not have any effect, and

it is objected to, as immaterial and irrelevant, and incompetent, and not cross-examination.

Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.
(Exhibit "C" shown witness.)

Mr. Weil:

Q. I now show you a paper marked for identification Exhibit "C," being the papers produced by your counsel—it has two sheets—and ask you if you received those at or about the date thereof.
A. Yes, sir, I think I received those.

Mr. Weil: I offer Exhibit "C" in evidence.
Mr. Irwin: The same objection.

Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.
(Exhibit "D" shown witness.)

135 Mr. Weil:

Q. I now show you a paper marked for identification Exhibit "D" and ask you if you received that, and I call your attention to the notation by you.
A. Received June 12th, signed "E. F. Jackman." I received that.
Q. That is the time you received it?
A. Yes, sir, I am sure of that.
Q. Well, that was received by you, as shown by your notations on the corner, on June 12th,
A. Signed by me.
Q. 1914?
A. Yes, sir, absolutely.

Mr. Weil: I offer the paper Exhibit "D" in evidence.
Mr. Irwin: The same objection.

Objection overruled.
To which ruling of the Court counsel for plaintiff except.
Exception allowed and bill sealed.

Mr. Weil:

Q. Now, Mr. Jackman, did you file any answers or replies to any of these notices, Exhibits "A," "B," "C" and "D," with either Mr. Dies or any other officer of the Bureau of Building Inspection?
A. I don't know whether I did or not.
Q. Well, what is your best recollection of it?
A. I don't know.

136 Q. Well, if you had filed any answer or objection to any of these proceedings, don't you think you would recollect what they were?

A. I think I would.

Q. Well then, wouldn't it be your best recollection, then, that you didn't file any?

A. I don't know whether I did or not, Mr. Weil.

Q. Well, what is your best recollection?

A. I thought I did.

Q. Well, what was the objection you made, if any?

A. Well, there was no necessity to put in a new party wall, our wall was all right, we were on our own property. That is the way I figured it.

By the Court: Don't tell us what you thought, but what you did.

Mr. Weil:

Q. I am asking you now, did you file any objection with Mr. Dies to these proceedings?

A. I can't answer that. My attorney probably filed it.

Q. I beg your pardon.

A. My attorney probably filed it.

Q. Did you instruct them to file any? Did you sign any, did you swear to any?

A. I don't remember; it is two years or more now.

Counsel for defendant reads to the Jury Exhibits "A," "B," B-1, "C" and "D."

137 Q. You said on yesterday, Mr. Jackman, that you did not remember the date exactly when there was nobody working on the building, but you thought it was in August—I think you said.

A. Well, I can't recall the date.

Q. You have no way of fixing the time, have you, now?

A. No, sir.

Q. It might have been, I presume, in July, or it might have been in August?

A. You mean the time they laid off?

Q. Yes.

A. I thought probably that was in August.

Q. What?

A. I thought it was in August.

Q. I say it might have been in July, according to your best recollection? Have you any way of fixing the time?

A. No, I haven't.

Q. Were you informed at that time by anybody—did you make any inquiries of why they were laying off?

A. Yes, sir.

Q. Weren't you told it was on account of the strike?

A. Part of it, for a few days. The strike only lasted three or four days; this lasted three or four weeks.

Q. Don't you know the strike lasted over two weeks?

A. No, I didn't know that.

Q. You were told at the time it was on account of the strike, weren't you?

A. I believe I was, yes, sir.

138 Q. The steel work, you said, on the balance of the Rosenbaum building had been carried up some distance before they built this steel work adjoining your building?

A. Yes, sir.

Q. That was about 20 feet?

A. I would imagine about one section of the steel was left off next to our building.

Q. Don't you know that they couldn't build that steel work alongside of your building until after the wall was taken down and the new foundations built on which to put that steel?

A. The old wall was taken down and the new foundation set, and that is what made me think, and made me take and send over dozens of times to Mr. Kelly and Mr. Stewart to make complaints why they didn't go on with the other part of the steel—only as a layman—I didn't know anything about building.

Q. You say it was after the wall was down?

A. After the wall was down.

Q. And after the new foundation was built?

A. I think so.

Q. That this steel was erected? Do you say that?

A. Well, I am not sure, Mr. Weil.

Q. That is what I supposed, because, of course, you didn't know just when the foundation was completed, did you?

A. Only what I heard them say.

Q. I say you didn't know?

A. No.

Q. You were not there where you could see when it was completed? And if the fact should appear that that steel work was actually set within a day after the foundation, or two days after the foundation was completed, then you would know you were mistaken, wouldn't you?

139 Objected to, as argumentative.

Objection sustained.

Question withdrawn.

Q. You said you told Mr. Kelly?

A. No, I didn't tell him, I sent word with my man.

Q. Then you had no talk with Mr. Kelly?

A. I don't remember of having any talks with Mr. Kelly about that.

Q. Is this Mr. Kelly—(indicating).

(Mr. Kelly requested to stand up.)

A. Yes, sir, I know Mr. Kelly. I don't remember——

Q. Well, that is the Mr. Kelly to whom you refer?

A. That is the gentleman to whom I refer.

(Mr. Stewart requested to stand up.)

Q. So that I understand you—did you yourself now make any complaint about that to Mr. Stewart?

A. This gentleman there—(indicating)—I made several complaints to Mr. Stewart. I don't know whether it was about this particular——

Q. I am asking you about this particular matter. You said you made complaints to the foreman and to Mr. Kelly and Mr. Stewart.

A. Through my man to Kelly.

Q. I am asking you if you personally made any complaint about this yourself, or said anything about this to Mr. Stewart?

A. I can't recall, but I think I did.

Q. You think you did?

A. I think I did.

140 Q. Can you think also of the time when you did?

A. No. I used to complain to Mr. Stewart every time I would see him, or mostly every time. I think he used to avoid me in the Duquesne Club when he would see me coming, because he would say, "Here comes Jackman with another complaint."

Q. You wouldn't blame him for that?

A. No, I wouldn't. I would have done the same thing myself.

Q. Especially if the complaints were unjustified?

Objected to.

Question withdrawn.

Q. Now, can you recall anything about a complaint about this particular matter that we are talking about—the delay in the erection of this steel—to Mr. Stewart, yourself?

A. I can't recall any particular complaint of that particular part of the building.

Q. You say you had an opportunity to rent this property some time in July or August?

A. Yes, sir.

Q. At that time the Davis Amusement Company had a lease of the property up to the first of September?

A. Yes, sir.

Q. And I believe you explained that your lease—the lease you had an opportunity of making—was to begin on the first of September?

A. Yes, sir.

Q. Who was it with?

A. Mr. Miles.

141 Q. Who?

A. Mr. Miles.

Q. Myers?

A. Miles, who afterwards took the Pitt Theatre.

Q. Who afterwards did what?

A. Who afterwards leased the Pitt Theatre, Miles of Detroit.

Q. When did he lease the Pitt?

A. He leased the Pitt—I think he took possession the first of September.

Q. At the time he was negotiating with you, he was negotiating with a number of other parties, wasn't he?

A. Not that I know of. He told me he came to Pittsburgh to lease the Duquesne Theatre.

Q. Was that all the conversation you had with him?

A. Oh, no; he said if he could get it,—he said "When could I get it?" And I said, "I think you can get it the first of September." I said, "Mr. Stewart told me he would try and have it for me." He said, "You won't get it the first of November." I says, "Why? These people are going to put on extra men and all that, and I think I can give it to you the first of September." He said, "You couldn't give it to me the first of November, I don't think." He said, "You never had any experience in business like this," and so on, and I took for granted that he had, and I said, "You can go up and lease the Pitt Theatre." And he said, "I didn't come to lease the Pitt Theatre; I cam- to lease the Duquesne." And he afterwards leased the Pitt Theatre.

Q. Was that all the conversation you had with him?

A. He said he came over to lease the Duquesne Theatre.

142 Q. Was that all the——

A. I never met him afterwards, to talk to him.

Q. Was that the only negotiation you had with him?

A. With him, yes, sir.

Q. Can you fix about when that was, the time?

A. I think it was either the middle of July or August.

Q. It was the middle, anyway?

A. Yes, sir, I know it was in the middle of the month.

Q. You say he represented the Pitt—that he had rented the Pitt?

A. Yes, sir.

Q. During the year 1914, he "busted," didn't he, and was unable to pay his rent, in the Pitt?

Objected to, as immaterial.

Objection sustained.

Question withdrawn.

Q. Now, you say you didn't succeed in renting your theatre at any time during the year from September 1st, 1914, to September 1st, 1915?

A. You say I didn't succeed in renting it?

Q. Yes.

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you rent it from September 1st, 1915, to September 1st, 1916?

A. No, sir.

143 Q. When did you rent it?

A. October 30th, 1916.

Q. The rent was paid by Mr. Davis, I think you testified, up until September 1st, 1914?

A. Yes, sir.

Q. The time his lease expired?
A. Yes, sir.

Mr. Irwin:

Q. Mr. Jackman, you were asked whether you were not informed that there was a strike on in the Rosenbaum Building, as an explanation of the delay. Were you informed anything about the necessity of getting new steel?
A. By the Rosenbaum people?
Q. Yes.
A. I think one of the messages that came back to me from——

Objected to.
By the Court: Just answer the question.

A. Was I informed?

(Question repeated.)

A. I heard that they were getting new steel.

Mr. Weil: Just a moment, Mr. Jackman. Don't let us get into trouble here for nothing. You know perfectly well that that question says to you, "By the Rosenbaum people." That is the question.
The Witness: Was I informed by the Rosenbaum people that they were getting new steel?

144 Mr. Weil:

Q. Yes, not what somebody else told you, or some messenger told you.
A. I don't remember.

Mr. Irwin:

Q. Did you ever say anything to Mr. Stewart about it?
A. I said *to* much to Mr. Stewart that I don't know. I can't recall.
Q. To whom did you rent your theatre on October 30th, 1915?
A. 1916. John Cort.
Q. John Cort?
A. Yes, sir.
Q. Is Mr. Cort in any way different from the ordinary theatrical manager?
A. Yes, sir.
Q. How is that?
A. He is a producer, he is a man that puts on plays, on the order of Belasco. And the difference in the theaarical men or producers and managers—he is a producer and manager both, he has a series of theatres in New York, Chicago, Seattle, Los Angeles and San Francisco, and giving him Pittsburgh, which is a one-night run from New York, making it a producing house. Instead of trying out new plays at Atlantic City or Wilmington or Chicago, he wants to put

them on in Pittsburgh and then send them around these circuits of theatres that he has. He is a producer.

Q. To a man like Mr. Cort, is the time of renting a theatre of the same importance as to the ordinary theatrical manager?

A. No, sir.

145 Mr. Weil: I object to that.

Objection sustained.

To which ruling of the Court counsel for plaintiff except.

Exception allowed and bill sealed.

Mr. Irwin:

Q. You mean by a producer that he makes his own plays?

A. Makes his own plays.

By the Court:

Q. He don't write them?

A. Oh, no; he produces them and then starts them out. Shall I give you an illustration or example? The last play that he had there was called "Johnny, get your Gun," or something—he produces this play there and then sends it over to New York to the New York house?

Q. Pittsburgh is the dog?

A. Yes, tries it on the dog.

Mr. Irwin:

Q. You may state whether or not Mr. Miles said to you that he would take the Duquesne Theatre if he could get it by the first of September.

Objected to.

Objection sustained.

146 Q. What, if anything, did Mr. Miles say regarding his willingness to rent the Duquesne Theatre?

Mr. Weil: That is objected to, as leading, and repetition.

By the Court: Hasn't the witness stated that on October 30th, 1913, he rented the building to Mr. Cort?

Mr. Irwin: Yes. I am talking about Mr. Miles.

By the Court: In 1914?

Mr. Irwin: Yes, sir.

By the Court: The objection is overruled.

To which ruling of the Court counsel for defendant excepts.

Exception allowed and bill sealed.

(Question repeated.)

A. Well, he said, that he would have rented the Duquesne Theatre if he could have gotten it the first of September. He was disappointed in not getting it.

By the Court:

Q. Don't tell us what he was, tell us what he said.
A. Yes, sir, he said he would have rented it if he could have gotten it the first of September.

147 Mr. Weil:

Q. According to the statement, then, he said he would have rented it if he could have gotten it the first of September? Is that what he said?
A. Yes, sir.
Q. Then he said that after the first of September, did he?
A. No; he said this along in July, when he visited me in July, on the stage of the theatre and saw the condition of the theatre.
Q. How could he have used the past tense then, how could he have said to you in July or August, "I would have rented"——
A. No. "I will take it."
Q. Just a moment, let me finish my sentence. How could he have said to you, "I would have rented the Duquesne Theatre if I could have gotten it by the first of September," when this occurred in July or August, before?
A. He took it for granted that I wouldn't get it before the first of November, and wanted to bet me on it.
Q. How could he have made such a statement then, before?
A. He said, "I would have taken the Duquesne theatre if I could have gotten it by September 1st."
Q. Are you sure those are the words he used?
A. I think so.
Q. Are you positive of that?
A. Well, I don't know.
Q. Don't you know it is absolutely impossible that a man speaking English could have said that in July or August? Now, just think for a moment. He said to you in July, "I would have rented the Duquesne Theatre if I could have gotten it by the first of September"—when the first of September hasn't arrived?

148 A. Will you let me explain that?
Q. Certainly; I want you to explain that.
A. In the middle of July, with the theatre in the condition it was, he says, "It is insane to think you can get it the first of September. But if I thought I could have gotten the theatre on the first of September, I would have leased it."
Q. Didn't this conversation occur after the first of September?
A. No, sir, the time that I told you, Mr. Weil.

By the Court:

Q. The middle of July or the middle of August?
A. Yes, sir.

149 I hereby certify that the proceedings, evidence and charge of the Court are contained fully and accurately in the notes

taken by me upon the trial of the above entitled cause, and that this copy is a correct transcript of the same.

CHESTER P. JOHNSTON,
Official Stenographer.

The following record of the proceedings upon the trial of the above entitled cause is hereby approved and directed to be filed.

JOSIAH COHEN,
Trial Judge.

150 EXHIBIT "B."

J.

S. A. Dies, Supt. Grant 3900.

Department of Public Safety,
Bureau of Building Inspection,
Pittsburgh, Pa.

May 21st, 1914.

Mr. E. F. Jackman, Pittsburgh, Pa.

DEAR SIR: In reference to application filed for Party Wall, between your property and the property of William Stanton, I have to-day examined your wall and will not approve the plan as filed by the Rosenbaum Company, lessee for the property of William Stanton. This was brought about by the present unsafe and dangerous condition of your wall.

Also the water tank on the corner of the building nearest Liberty Avenue should be emptied, as the wall is not suitable to carry said tank.

I enclose herewith a copy of letter to William Stanton setting forth my views in connection with the matter.

Yours truly,

S. A. DIES,
Superintendent.

151 EXHIBIT "B-1."

J.

Copy.

S. A. Dies, Supt. Grant 3900.

Department of Public Safety,
Bureau of Building Inspection,
Pittsburgh, Pa.

May 21st, 1914.

Mr. William Stanton, c/o Rosenbaum Company, Pittsburgh, Pa.

DEAR SIR: I wish to notify you that on examination of the present wall between the property of the Duquesne Theater and that of your property, fronting on Penn Avenue, for which you have made an application to construct a Party Wall, and filed application and plan in this Bureau, would state that the wall of the Theater property is in and unsafe and dangerous condition and unsuitable to use in the manner you propose to use in connection with the construction of new wall.

You will, therefore, make arrangements to file plans in this office as to what you propose to do in the matter of the Party Wall.

Yours truly,

S. A. DIES,
Superintendent.

152 EXHIBIT "E."

This agreement made the thirty-first day of March in the year one thousand nine hundred and fourteen by and between James L. Stuart of the City of Pittsburgh, Pennsylvania of the party of the first part (hereinafter designated the contractor) and, The Rosenbaum Company, a corporation organized under the laws of the State of Pennsylvania, of the City of Pittsburgh, Pennsylvania, party of the second part (hereinafter designated the Owner), witnesseth:

Whereas, the said owner desires to erect a building on the plot of ground located on Liberty Avenue, Sixth Street (now Federal Street) and Penn Avenue, in the City of Pittsburgh, Pennsylvania, described as follows:

Beginning at the Northwesterly corner of Liberty Avenue and Federal Street, and running thence along Federal Street Northwardly two hundred forty (240) feet, more or less, to Penn Avenue; thence westwardly along Penn Avenue one hundred four (104) feet, more or less, to land of Jackman; thence Southwardly and parallel with Federal Street one hundred twenty-seven and one half (127½) feet, more or less, to the Southerly side of an alley fifteen

(15) feet wide; thence Westwardly along said alley thirty-one (31) feet, more or less, to property of Kaufmann; thence Southwardly along property of Kaufmann, and parallel with Federal street, one hundred twelve and one half (112½) feet, more or less, to Liberty Avenue; and thence Eastwardly along Liberty Avenue one hundred thirty-five (135) feet, more or less, to Federal street at the place of beginning.

Now, therefore, the parties mutually agree as follows:

Article 1.

The Contractor shall wreck and remove all the buildings now occupying the above described plot of ground as provided for in
153 specifications prepared by Jarvis Hunt, Architect, and the Contractor shall thereafter erect upon said described plot of ground, a building in conformity, with the plans and specifications prepared by Jarvis Hunt, Architect, and as compensation therefor receive*d* the amount of cost of same to said Contractor and forty five thousand dollars ($45,000) as a profit, said cost and profit to be *competed* and paid as hereinafter provided. Triplicate copies of said plans and specifications are identified by the signatures of the parties hereto and made a part of this contract.

Article 2.

The owner shall pay the contractor said cost and said profit at the times and in the amounts determined as follows: On or about the first day of each month hereafter the Contractor shall deliver to the Architect (or to his designated representative), and to the Owner, an estimate giving statement in detail of amount of work done and material furnished under this contract, during the previous calendar month. The Owner the architect, and their respective representatives, shall have the right to examine all the books and records of the Contractor for the purpose of determining the correctness of said estimates; and within five (5) days after the receipt of said estimate from the contractor, the architect shall deliver to the contractor a certificate setting forth the amount which the architect shall, in his judgment, find to be due the Contractor for work done and materials furnished within such calendar month, and within five (5) days after presenting said certificate by the contractor to the owner, the owner shall pay the contractor the amount of said Estimate less ten per cent (10%), which shall be withheld and retained by the owner until thirty (30) days after the completion of the work and the delivery by the architect of the final certificate hereinafter provided for; provided, however, that the amount retained shall not exceed fifty thousand dollars ($50,000).

154 The said profit of forty-five thousand dollars ($45,000) to be paid by the owner to the contractor shall be payable in amounts and at times following to wit: (Said contractor shall be entitled to receive a sum equal to three and one half per cent (3½%)

of the amounts of expenditures certified and approved by the architect as provided in the next preceding paragraph, said sums to become due and payable immediately upon the issuance of such architect's certificates; provided, however, that ten per cent (10%) of the amount of profit payable monthly shall be withheld and retained by the owner until thirty (30) days after the completion of all the work herein provided for, and balance shall then be paid upon the final certificate of the architect setting forth that said work has been completed in accordance with the contract and specifications, the total profit not to exceed forty-five thousand dollars ($45,000).

Article 3.

It is further mutualiy agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate, or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article 4.

Said Contractor shall, subject to the approval of said architect and said owner, carefully supervise the construction of said buolding, and let all sub contracts, as provided for in the specifications mentioned in Article VII, of this contract, relating to the construction of said building. In addition thereto, the said contractor shall, subject to the approval of said architect and said owner, supervise ail sub contracts and work covered by the plans and specifications for the heating and ventilating system, the electrical work, the boilers, pumps, piping, generators, vacuum system, elevator work, sprinkler systems, and other mechanical appliances required to complete this building. The cost of this additional work is not to be included in the hereinafter mentioned guaranteed price, and the contractor's profit of forty five thousand dollars ($45,000) shall not be increased thereby. Said owner and said architect, or their authorized representative, shall at all times have access to the said premises and the building, and be permitted to examine the work and material.

Article V.

Said architect's fees are to be paid by said owner and are not to be included in the cost of said building. No charge shall be made for the services of any one connected with the offices of said contractor, nor for any clerical or other services in any of his offices, other than the temporary office in said building, and then only while the persons employed in said temporary office shall be *given* their time and services exclusively to the work herein provided for. All tools and machinery equipment used in the performance of this contract and all such pumping of water from the premises as may be required and necessary shall be furnished and done by the contractor, and it is

expressly agreed between the parties hereto that the sum of eight thousand dollars ($8,000) which is included in the hereinafter mentioned guaranteed price is fixed to cover the use of said equipment, tools, machinery and said pumping. Lumber used in scaffolding or for other temporary purposes will be credited to the owner at its estimated value when removed.

Article 5.

The building during construction shall be insured by said owner against fire for the benefit of the parties hereto as their interests may appear. Such fire insurance shall be for an amount which
156 shall be specified by the owner and the contractor shall pay one half of the premiums for a period extending two months after the time stated herein for the completion of building. The contractor shall during the entire period while the building is being constructed, indemnify and save the said owner harmless against all claims for damages to persons and property occurring in connection with such work, caused by the negligence of said contractor, or his agents, servants, or employees, or otherwise. The said contractor shall include in the cost of said building the cost of such insurance against such claims for personal injury. Cost of premium on surety bonds and of permits &c. shall also be included as cost of the work.

Article VII.

The contractor agrees, guarantees and warrants that he will furnish and perform all the work, labor, and materials provided for and covered by Architect's Plans on Sheets Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 13½, 14, 15, 16, 17, 18, 19, 19½, 20, 21, 22, 23, 24, and 25, 25*a*, 26 and 27, dated February 2nd 1914, and revised March 16th, 1914, and plumbing and sewerage plans, Sheets Nos. P 1 to P 12 inclusive, dated February 2nd, 1914, and Sheets F-1A, F 2A, F 3A and F 4A, dated March 16th, 1914, and F 6, F 7 and F 12, dated February 14th, 1914, and as specified in Architect's Specifications, pages No. 1, 2c 151 inclusive, dated February 2nd, 1914, and Instructions to Bidders and Addendo Specifications on P 1 to 17 inclusive, dated March 16th, 1914, so that the same shall not cost the owner including the contractor's profit of forty five thousand dollars, ($45,000) a sum in excess of one million and six thousand dollars, ($1,006,000), which amount is the amount herein referred to as the Guaranteed Cost.

157 Article VIII.

The contractor agrees that all work, exhibited in the plans or drawings and not called for in the specifications, or vice versa, shall be executed and performed in like manner as if the same were fully mentioned and described in both thereof, respectively, without extra charge.

Article IX.

The said architect shall furnish to the contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the said contractor shall conform to the same as part of this contract, so far as they may be consistent with the original drawings and specifications referred to and identified as provided in Articles 1 and 7.

It is mutually agreed and understood that all drawings and specifications now are and shall remain the property of said architect, and shall be returned to him on the completion of the building. The architect will furnish the contractor three (3) complete sets of plans covering all work to be done by him and shall furnish as many more copies of same as contractor shall require but at contractor's expense.

Article X.

No alterations shall be made in the work shown on or described by the drawings and specifications, except upon written order of said architect, and when so made the value of the work added or omitted shall be computed by the said architect, and when so ascertained shall be added to or deducted from the guaranteed cost named in Article VII. In case either party hereto is dissatisfied with such computation by said architect, such party shall, within ten days (10) after notice by the architect of his said computation, serve
158 written notice upon the other party hereto, setting forth the particular computation as to which such party is so dissatisfied, and in case of failure of the parties to agree upon such matter in dispute, the question shall be submitted to three disinterested arbitrators, one to be appointed by each of the parties to this contract. If either party fails to appoint an arbitrator for five days after receiving a written request to do so, the other party may then appoint a disinterested person as arbitrator for the party in default. The third arbitrator shall be appointed by the two so chosen. The decision of any two of said arbitrators shall be final and binding upon all of the parties to this contract; and the expenses of such arbitration shall be borne by the parties hereto in equal shares.

Article 11.

The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architect or his authorized representative, or by the owner or its authorized representatives. The contractor shall, within twenty four hours after receiving written notice from the architect to that effect, proceed to remove from the grounds or building all material condemned by him, whether worked or unworked, and to take down all portions of the work which the architect shall, by written notice condemn as unsound or improper, or which, in any way, does not conform to the

drawings and specifications. The contractor agrees to keep a competent man on said work at all times to receive instructions from the architect or his superintendent.

Article 12.

Should the contractor at any time refuse or neglect to provide a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, or failure being
159 certified by the said architect, the owner shall be at liberty after five days' written notice to the contractor, to provide any such labor and materials and to deduct the cost ther-of from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient grounds for such action, the owner shall be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended in this contract, of all toois, materials and appliances thereof, and to employ any person or persons to finish the work and to provide the materials therefor; and in case of the discontinuance of the employment of such contractor, he shall not be entitled to receive any further payment under this contract, until the said work shall be wholly finished, at which time, if the cost to the owner shall not exceed the guaranteed cost, the owner shall pay the contractor the amount which the owner withheld from the contractor out of the architect's estimates not more, however, than will bring the cost up to the guaranteed cost, but if the cost to the owner shall exceed the guaranteed cost, the contractor shall pay the difference or excess over the guaranteed cost to the owner. If the contractor shall abandon the work contemplated under the terms of this agreement and refuse to complete the same he shall not be entitled to receive or be paid any profit whatsoever on account of the work done by him, and any part of said profit that may have been paid prior to the date of such abandonment shall immediately become due and payable to the owner. The expense incurred by such default shall, be audited and certified by the architect, whose certificate thereof shall be conclusive upon both parties.

Article 13.

The contractor agrees to complete the several portions and the whole of the work comprehended in this agreement by the
160 Second day of January nineteen hundred and fifteen. Time is the essence of this agreement. It is agreed that should the contractor fail to finish the work on the date aforesaid said contractor shall pay to said owner as damages for the failure and delay the sum of five hundred dollars ($500.) per diem for each and every working day thereafter the said work remains incomplete; and it is further agreed that should the contractor complete said work before the date

aforesaid the contractor shall receive from the owner as a bonus the sum of five hundred dollars ($500.) per diem for each and every working day previous to date set for completion. The building shall be considered complete for the purpose of fixing the time for paying bonus or damages provided for in this article when it is substantially completed and in condition for the owner to occupy and conduct its business therein.

Article 14.

Should the contractor be hindered or delayed in the prosecution or completion of his work by any act, neglect, delay or default of the said owner or of the said architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, floods, lightening, earthquake, or cyclone, acts of God, or by strikes or lockouts, occurring through no default or neglect of the contractor or by the abandonment of the work through no default of the contractor, then the time fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such extension shall be made unless claim therefor is presented in writing to the architect within five days after the last day of such delay. The duration of such extension shall be certified by the architect, but in case of disagreement of the parties his decision may be submitted to arbitration in the manner provided in Article 10 of this agreement.

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Article 15.

It is agreed that the work shall not be interrupted by reason of or during arbitration as provided in Articles 10 and 14, and the contractor shall proceed with the execution of all work as may be directed by the architect while such arbitration is pending.

Article 16.

The contractor is to be given possession of a portion of the premises and of the drawings and specifications mentioned in Article 1 on the date this contract is executed, and of the remainder of the premises by May 1st, 1914.

Article 17.

The contractor covenants and agrees that no claim or lien shall be filed against said building or said premises or any part of said building or said premises, by himself, or by any subcontractor or by any contractor or material man furnishing any work, labor or material whatsoever to or for said building, nor by any other person or persons whatsoever for any cause whatsoever.

Article 18.

The contractor shall, before receiving payment of the final estimate, satisfy the owner that all work, labor and material furnished by him for or about the construction of said building have been paid for in full.

In witness whereof the parties have caused these presents to
162 be executed the day and year first above written.

JAMES L. STUART.
THE ROSENBAUM COMPANY,
By M. ROTHCHILD, *President.*
J. M. CRAWFORD, *Secretary.*

(Corporate Seal.)

Witness:
CHARLES M. THORP.

163 In the Court of Common Pleas of Allegheny County, Penna.

No. —, April Term, 1915.

EDWARD F. JACKMAN

vs.

ROSENBAUM COMPANY, a Corporation.

Plaintiff's Requests to Charge the Jury.

The learned trial judge is respectfully requested to charge the jury as follows:

First. That under the Act of 1895, P. L. 139, relating to party walls in cities of the second class, where an existing wall is torn out in an adverse proceeding under said Act, the adjoining owner may recover the cost of putting his property back into the shape it was before the wall was removed without proving negligence against the other owner or the contractor constructing the party wall.
Refused.

Second. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is unconstitutional under the bill of rights and the constitution of the State of Pennsylvania.
Refused.

164 Third. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing

wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States.

Refused.

Fourth. That the defendant's refusal and failure to replace plaintiff's building in the shape it was before the wall was torn out constituted negligence, in consequence of which the plaintiff is entitled to recover whatever sums were reasonably expended in replacing his building in the condition it was before the wall was removed.

Refused.

Fifth. That the plaintiff is entitled to recover the fair rental value of his premises from the 1st of September, 1914 to the time when he could by the exercise of reasonable diligence put his property back into shape for occupancy, without proof of negligence.

Affirmed if the Jury should find defendants were guilty of want of ordinary diligence in prosecuting the work.

Sixth. If the jury should find that through the negligent operation of the defendant in the construction of this wall an unreasonable delay was caused, thereby causing the plaintiff to lose an opportunity of renting his property for the year beginning September 1st, 1914, the plaintiff is entitled to recover the fair rental value of said premises for said year.

Refused.

Respectfully submitted.

WATSON & FREEMAN,
Attorneys for Plaintiff.

165 [Endorsed:] #1373, April Term, 1915. E. F. Jackman vs. The Rosenbaum Company. Plaintiff's Requests to Charge Jury. Watson & Freeman, Attys. for Pltff. Filed Mch. 28, 1917.

166 In the Court of Common Pleas of Allegheny County.

No. 967, July Term, 1915.

E. F. JACKMAN

vs.

THE ROSENBAUM COMPANY.

Plaintiff's Additional Request to Charge Jury.

That under the law and the evidence the verdict of the Jury should be for the plaintiff for the cost of repairs necessary to replace the eastern wall to its former condition. Affirmed if resulting from negligence or delay from want of ordinary reasonable diligence.

WATSON & FREEMAN,
Attorneys for Pltff.

167 [Endorsed:] #967, July Term, 1915. E. F. Jackman vs. The Rosenbaum Company. Plaintiff's Additional Requests to Charge Jury. Watson & Freeman, Attorneys for Pltff.

168 In the Court of Common Pleas of Allegheny County, Pa.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN.

vs.

THE ROSENBAUM COMPANY, a Corporation.

In Trespass.

Defendant's Requests for Instructions to the Jury.

The defendant respectfully requests the Honorable Court to charge the jury as follows:

1st. Under all the evidence in the case your verdict must be for the defendant.

Refused.

2nd. It affirmatively appears in the case that the defendant in removing the plaintiff's wall and in erecting a party wall to stand in its place, proceeded in accordance with the provisions of the Act of June 7, 1895, P. L. 135, relating to the construction of party walls in cities of the second class. Under the provisions of this statute every owner of a lot of ground in the city of Pittsburgh has the right to erect a party wall between himself and his neighbor and may enter upon the adjoining lot for that purpose, not going beyond the limit prescribed by the Department of Building Inspection. This
169 right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom.

Affirmed.

3rd. Where the owner of a lot of ground situate in the city of Pittsburgh, in pursuance of his statutory right and in accordance with the provisions of the statute, goes upon the land of an adjoining owner and removes a wall so situated thereon as to prevent the erection of a party wall upon the line between the two properties, and erects a party wall in its place, he is not liable in damages for any inconvenience or injury necessarily occasioned by the exercise of the right. Such a work must of necessity incommode the neighbor. It cannot be prosecuted without an entry upon and a partial occupation of his premises. It must disturb his enjoyment and that of his tenant. It may prevent the renting of his property; it may injure him in other ways; but so long and in so far as these injuries are necessarily incident to the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor. Where a

lot owner is in the exercise of a legal right, the necessary results arising from the exercise of that legal right do not make him responsible in damages if he should happen to injure the adjoining owner.

Affirmed.

4th. The defendant company, having the right to build a party wall upon the line between the premises to be occupied by it and the theater building owned by the plaintiff, and having in the exercise of this right the further right to take down the old wall of the Duquesne Theater on the side nearest its property, is not liable
170 to the plaintiff for whatever damages were suffered by the plaintiff which were necessarily incident to and followed from the removal of the old wall and the erection of the party wall in its place.

Affirmed.

5th. The contract between the defendant company and James L. Stuart, who did the work of removing the old wall and erecting the party wall in its place, constituted and made the said James L. Stuart an independent contractor for the removal of the old wall and the erection of the party wall in its place. The defendant company is not liable for any injuries to the plaintiff resulting from the negligence of the said James L. Stuart or any of his employees in the course of the work, nor for any lack of diligence of the said James L. Stuart in the prosecution of the work. Indemnity for any damages caused to the plaintiff from the negligence of said James L. Stuart or any of his employees, or from any lack of diligence in prosecuting the work, must be sought by the plaintiff not from the defendant but from the said James L. Stuart, who is responsible therefor.

Refused.

6th. If the jury should believe from the evidence that there was another method by which the theater building could have been shored up, just as good or even better than the method followed by the contractor, and even if they should *be* believe that by adopting such other method the work of completing the party wall could have been completed before September 15th, nevertheless if the contractor who was in charge of and doing the work, in good faith adopted the plan followed, believing that it was the best plan, and such plan was in accordance with the approved practice and usage of the trade under like conditions, then he, the contractor, had the right
171 to adopt such plan, and follow the same, and as the uncontradicted evidence shows that the plan adopted and followed was adopted in good faith and after mature consideration, and that the same was a method approved by the practice and usage of the trade, and that the party wall was completed with due diligence and within a reasonable time under said plan, the requirements of the law have been met, and there can be no recovery for damages on account of the wall not having been completed before September 15th, and the verdict of the jury on this contention of plaintiff's, for not completing said wall before September 15th, must be for the defendant, and no damages can be recovered therefor.

Refused.

7th. There is no evidence sufficient to be submitted to the jury of want of diligence or negligence in adopting or prosecuting the plan for taking down the wall of the theater and building the party wall in its place to the height of the theater, so that the plaintiff could occupy the same on September 15th, and even if there should be some evidence of negligence in extending the wall above the theater building, as to the dropping of building materials upon the roof and in the gutters and causing leaks in the roof and filling up of the down-spouts and drains, as alleged by plaintiff, there is no proof from which the jury could ascertain the amount of the damages, if any, thereby caused, and therefore there can be no recovery therefor, and the verdict must be for the defendant.

Refused.

8th. For removing the wall of the theater and building the party wall and entering upon the premises of plaintiff for these purposes, and all work thereon necessarily incident thereto, there can be no recovery, as it is damnum sine injuria and the verdict of the
172 jury must be for the defendant.

Affirmed if there was no negligence or want of due diligence.

9th. On the claim of want of due diligence, and negligence for failure to complete the party wall so that plaintiff could get the use of the theater prior to September 15th, there is no evidence sufficient to be submitted to the jury, and the verdict must be for the defendant.

Refused.

10th. On the claim of damages for negligence in permitting building material to drop on the roof of the theater, and in the gutters, and for the stoppage of the drains and down-spouts, after the wall was continued above the roof of the theater, there is not sufficient evidence of the amount of the damages or loss thereby occasioned, to be submitted to the jury, and the verdict must be for the defendant.

Refused.

Should the Court refuse any of the foregoing points, and be of the opinion that there is any question to be submitted to the jury, then the Court is respectfully requested to charge the jury.

11th. The defendant company was obligated in taking down the old wall and erecting the new party wall, to take only reasonable precautions to prevent unnecessary injuries to the plaintiff from the prosecution of the work, and to use reasonable diligence in prosecuting the same. Its whole duty was negative, that is, to do no unnecessary harm. It was not obligated to prevent harmful consequences in the exercise of its right to take down the old
173 wall and erect a new party wall in its place. All that it was obligated to do, as a matter of law, was to exercise its right in

such a way as not to unnecessarily injure its neighbor, to take reasonable care, and to use reasonable diligence in the prosecution of the work.

Affirmed with the qualification that defendant was obligated to prevent "harmful consequences" arising from negligence or want of due diligence.

12th. In so far as the time taken to remove the old wall and to erect a new party wall in its place is concerned, said James L. Stuart was an independent contractor, and the defendant company is not liable for any lack of diligence, if there was any, in the prosecution of the work by him, and the verdict on this claim must be for the defendant.

Refused.

13th. If there was, and by reason of, any negligence or lack of due care in the removal of the old wall and the erection of the party wall in its place, the plaintiff suffered any damages, James L. Stuart, an independent contractor, is responsible for the same, and not the defendant company, and the verdict of the jury must be for the defendant on this claim.

Refused.

14th. If there was any negligence or lack of due care in the shoring up of the Duquesne Theater and protecting the interior of the same from injury, which negligence resulted in damage to the interior of the theater, or to its structure, said James L. Stuart is responsible for the same and the defendant company is not,
174 and the verdict must be for the defendant on this claim.

Refused.

15th. If there was any negligence or lack of due care in the construction of the party wall above the roof of the Duquesne Theater, and if the roof of said Duquesne Theater was improperly protected from the dropping upon said roof of materials used in the erection of the wall, and if the dropping of said materials caused any leaks in said roof or blocked the pipes by which said roof was drained, or if the gutters and down-spouts of said roof were improperly connected by the said James L. Stuart or his employees with the drains, said James L. Stuart and not the defendant company is responsible for all damages to the plaintiff resulting therefrom, and the verdict must be for the defendant on this claim.

Refused.

16th. The evidence of the plaintiff is to the effect that all of the damages testified to by his witnesses were caused by the removal of the old wall. There is no evidence in the case as to the amount of damages caused by any of the alleged acts of negligence on the part of the defendant company or James L. Stuart, the contractor. The jury cannot therefore allow the plaintiff any damages for the injuries done by the dropping of loose material upon the roof of the

theater, or the cracking of the proscenium arch, etc. The plaintiff having chosen to base his case upon an alleged right to recover for all damages sustained by him in the prosecution of the work, regardless of whether caused by negligence or not, cannot recover damages caused by particular acts of negligence, because he has failed to show the amount of the damage caused thereby. The jury is not entitled to guess at the amount of damages caused by these alleged
175 acts of negligence, there being no separation of damages as to these alleged negligent acts, and their verdict must be for the defendant.

Refused.

17th. The plaintiff is not entitled to recover any rents which he may have lost by reason of the action of the defendant in taking down the old wall and erecting a party wall in its place. Such damages are purely speculative. There is no evidence in the case sufficient to warrant the jury in finding that the plaintiff could have rented his property for the ensuing year. There is no evidence of the rental value of the property. Evidence that during a prior term of five years the property had been rented for a certain amount is not sufficient evidence on which the jury can base a finding that it could have been rented for the same amount, or any amount, for the ensuing year. The plaintiff has failed to prove a definite, complete offer to rent the property for the season 1914-15. He has failed to prove the rental value for that period. It does not appear that the prospective lessee was financially sound. It does not appear what rental he would or could have paid. It does not appear what sum the lessor would have been compelled to expend in order to put the theater in the condition required by the lessee. Without the evidence before them, the jury cannot find that the plaintiff lost any rentals by reason of any action of the defendant, and cannot therefore allow any damages on account thereof. Such damages are too speculative and uncertain to be considered by the jury. The fact that the theater was not rented during the season 1915-16, nor the fact until November, 1916, negatives any contention of the plaintiff that he lost one year's rental by reason of the fact that the theater was not fit for occupancy on September 1, 1914, and the
176 verdict must be for the defendant on this claim for rental value of the property.

Refused.

18th. Inasmuch as the lessee of the theatre paid rentals thereon up to and until September 1, 1914, plaintiff is not entitled to recover any compensation for loss of use prior to September 1, 1914, and as plaintiff obtained possession of the theater on September 15th following, he was only deprived of said use for said fifteen days.

Refused as presented.

19th. The plaintiff's building was erected and intended for, and usable only as, a theater, and could be used as such only on permit by the proper municipal authorities, and the claim for damages is

made by plaintiff in his declaration and proofs only for loss of rental as a theater. It appears in evidence that the municipal authorities of the city of Pittsburgh refused to grant such permit after June 1, 1914, and that prior to that time they had refused to permit the building to be used as a theater because of the defective condition of the side wall of the theater. The plaintiff having failed to aver or to prove that he could have secured such a permit at any time while the work of removing the old wall, construction of the party wall, and repairing the theater building were being carried on, he is not entitled to recover any compensation for loss of use of said theater, for the reason that he has failed to prove that he could have used said theater during said period of time, and it appeared on the contrary that he could not so have used the same, and there being no evi-
dence of the date when the permit to use the theater was
177 granted, or could have been obtained, there can be no recovery in this case for failure to rent or loss of rental of said theater.

Refused.

20th. The defendant having a legal right to remove the old wall and to erect a party wall in its place, was at liberty to exercise that right at any time, as required by its own building operations, and is not liable to the adjoining owner for any special damages resulting to said adjoining owner by reason of the particular time, with reference to the period of the renting season, in which the work was undertaken and performed.

Refused.

WEIL & THORP.
Attorneys for Defendant.

178 [Endorsed:] In the Court of Common Pleas of Allegheny County, Penna. No. 1373, April Term, 1915. Edward F. Jackman v. The Rosenbaum Company, a Corporation. Defendant's Requests for Instructions to the Jury. Filed Mch. 28, 1917.

179 In the Court of Common Pleas of the County of Allegheny, Pa.

No. 1373, April Term, 1915. "A."

EDWARD F. JACKMAN

versus

ROSENBAUM COMPANY, a Corp.

Verdict.

And now, to wit: March 28, 1917, we, the Jurors empanelled in the above entitled case, find for plaintiff in the sum of Twenty-five thousand dollars, $25,000.

JOHN BLOCK, *Foreman.*

180 [Endorsed:] No. 1373, April Term, 1915. "A." Edward F. Jackman versus Rosenbaum Company, a Corp. Jury Sworn, Mch. 19, 1917. Verdict. —— —, 191–. Prothonotary's Office, Allegheny County, Pa. Filed Mar. 28, 1917. Filed —— —, 191–. —— ——, Prothonotary.

181 In the Court of Common Pleas of Allegheny County, Pa.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN

vs.

THE ROSENBAUM COMPANY, a Corporation.

In Trespass.

Motion for Judgment Non Obstante Veredicto Ex Parte Defendant and Order of Court.

And now, to wit: March 31, 1917, The Rosenbaum Company, the defendant above named, by Weil & Thorp, its attorneys, having presented a point for binding instructions in its favor at the trial of the above entitled case, and said point having been refused, moves the court to have all the evidence taken upon the trial of said case duly certified and filed so as to become part of the record, and for judgment in favor of the defendant upon the whole record, according to the provisions of the Act of Assembly approved April 22, 1905, P. L. 286.

WEIL & THORP,
Attorneys for Defendant.

Order of Court.

And now, to wit, March 31, 1917, on motion of Weil & Thorp, attorneys for defendant, a rule is hereby granted on the plaintiff in the above entitled case to show cause why judgment should
182 not be entered for the defendant non obstante veredicto. It is further ordered that all the evidence taken upon the trial of the above entitled case be duly certified and filed so as to become part of the record.

BY THE COURT.

183 [Endorsed:] In the Court of Common Pleas of Allegheny County, Penna. No. 1373, April Term, 1915. In Trespass. Edward F. Jackman, vs. The Rosenbaum Company, a Corporation. Motion for Judgment Non Obstante Veredicto Ex Parte Defendant and Order of Court. Filed Mch. 31, 1917.

184 In the Court of Common Pleas of Allegheny County, Pennsylvania.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN

v.

THE ROSENBAUM COMPANY.

Opinion, Cohen, J.

Cohen, J., Trial Judge.

Motion for Judgment N. O. V.

Argued before Shafer, P. J.; Macfarlane and Cohen, JJ.

This action is instituted to recover damages for alleged injuries to the Duquesne Theatre, owned by plaintiff, and situate on Penn Avenue, Pittsburgh, Pa., during the removal by defendant of an old wall on plaintiff's property, which was condemned by the city authorities and ordered removed, so that the erection of a party wall, under and by virtue of the provisions of the Act of Assembly of Pennsylvania, approved June 7, 1895, P. L. 135, could be accomplished. The statement does not allege that the provisions of said law were not strictly complied with by defendant, nor was there any evidence to that effect. It was, indeed, conceded by plaintiff that the same had been strictly complied with.

The verdict rendered was for $25,000. Motions for new trial and for judgment N. O. V. were filed by defendant. No motion for a new trial was made by plaintiff. The defendant's motion
185 for new trial having been withdrawn, we are, therefore, not now concerned with any alleged errors at the trial, either as to admissions of evidence or that may have been made in the charge. The controlling question for the Court is whether or not the work was done by an independent contractor; if not, then whether there is any evidence as to damages arising from negligence or delay in the operation justifying its submission to the jury.

The evidence presented by the defendant was undisputed as to the work having been done by an independent contractor.

Defendant was lessee and owner of certain properties adjoining and adjacent to said theater, and was engaged in the erection of a very large department store thereon, running from Penn Avenue to Liberty Avenue, a distance of — feet. In the construction thereof, defendant contracted with James L. Stuart. The testimony shows he was a recognized expert, scientific and practical builder, who had built some of the largest stores and edifices in this and other great cities.

The contract between Stuart and defendant was in writing and offered in evidence as Exhibit "E". It was also undisputed that the work in question, to wit, the building of said wall and defendant's department store, was neither hazardous, extraordinary or dangerous. The defendant reserved no right or authority therein whatsoever over the work, except those pertaining to such necessary changes in the plans and specifications as the architect might find necessary, and other like matters, recognized by legal decisions as in no way interfering with the principles governing independent contracts. The whole procedure incident to the building was vested by the contract in the said Stuart, who thereby became an independent contractor, and was alone responsible for any negligence or delay in its
186 performance; the principle being undoubted that when a contractor takes entire control of the work, the employer reserving no right of supervision, nor of interference, then the employer, if he is not negligent in his risks, is not liable to third parties for the contractor's want of care in the execution thereof. This doctrine, whilst applicable to individuals, is equally applicable to private corporations who have no public duties to perform under the provisions of their charter, nor enjoy any emoluments thereunder, and is sustained by an unbroken line of decisions, both in these United States and England. It is needless to cite authorities to prove this well recognized principle. We might refer, however, to the case of Negus v. Becker et al., 143 N. Y. 303-8, 38 N. E. 290 (1894), which was an action brought for the recovery of damages for alleged injuries to property occasioned by the falling of a brick wall being carried up at the instance of the defendant, upon a party wall between the premises of himself and the plaintiff, and which case, by analogy, applies to the one at bar. Mr. Justice Gray held in that case that:

"The defendants had the conceded right to carry up this wall, of which they were joint owners, for the use of their building, and they provided for its erection in a lawful, proper and usual way. If there was negligence in the construction of the wall, and its fall could be attributed in any wise to some act of commission or omission in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor. By the contract between him and these defendants, he undertook to construct the wall. It was not a matter which the defendants were competent to engage in, and in contracting with Robinson they placed themselves in a position which exonerated them from any responsibility for a
187 negligent performance of the work. The performance of the work contracted for was neither dangerous nor extraordinary in itself, and hence the rule would apply that, for an injury resulting to another by reason of a negligent performance, the remedy would be solely against the contractor.. * * * If the fall of the wall was through some negligence in its construction, or in securing it, the liability was the contractor's, and not the property owners'."

In 86 Pa., 153, Mr. Justice Mercur, delivering the opinion of the Court, says:

"If one renders service, in the course of an occupation, representing the will of his employer only as to the result of his work, and not

as to the means by which it is accomplished, it is an independent employment. It is well settled in England and in this country, that persons not personally interfering or giving directions respecting the manner of the work, but contracting with a third person to do it, are not responsible for a wrongful or negligent act in the performance of the contract, if the act agreed to be done is legal."

The plan adopted by defendants for erecting the building and wall was one in common and general use by the trade, justifying, therefore, its adoption in this case. The evidence clearly established that defendants and the contractors carefully analyzed the whole situation after having obtained the opinion of expert engineers and architects, and agreed upon the plans in this case as the best and quickest in the judgment of the contractor. The results showed this conclusion to have been correct. There is no evidence whatsoever that the plan so adopted was not faithfully executed to the end. The testimony of Messrs. Stuart, Kelley, Hoffmeyer, and others, all of whom were experts, established this fact, and their testi-
188 mony was corroborated by that of many other expert contractors called by defendant, all of whom testified the work was done with due diligence.

No authority can be cited in Pennsylvania indicating that the doctrine of independent contractorship does not apply in the erection of party walls, or why an exception should be made in such cases. But there are numerous cases in Pennsylvania all pointing to the contrary: Miller v. Merritt, 211 Pa. 127; Painter v. Mayor, et al., 46 Pa. 213; Reynolds v. Braithwaite, 131 Pa. 416; and which apply the principle of independent contracts to situations analogous to the erection of a party wall.

Plaintiff's counsel presents two cases upon the faith of which he plants his proposition that the doctrine of independent contractorship is not applicable to a party wall. The one case was Fowler v. Saks, 7 L. R. A. 649, Dist. of Col. (1890). This was an action brought to recover damages caused by the removal of an old party wall and the erection of another in its place. The building regulations of the District of Columbia provided that the person removing the old wall and erecting a new wall in its place, should also make good the damages occasioned thereby to the adjoining owner on his premises, by reason whereof it was held that it was "the duty of the defendants under the building regulations to make good all damages occasioned by this building operation, and they could not get rid of that duty by employing a contractor to do the work." The other case cited was Bower v. Peate, L. R. 1 Q. B. Div. 321 (1876), but has no reference to party walls. It was there held that an adjoining owner excavating on his own premises is bound to support his neigh-
189 bor's premises, a legal conclusion which is in direct opposition to all the Pennsylvania authorities upon that subject.

It seems, therefore, to be a well established proposition that in all cases such as the one at bar, the doctrine of independent contractorship applies, for as shown by the testimony, the shoring up of the walls of the Duquesne Theatre, the removal of the old wall and the erection of the steel, concrete and brick wall in its place, with foun-

dations running thirty feet or more below the street level, was work, the character of which required the services of skilled architects, competent engineers and expert contractors. It is equally clear that the defendant company, which was organized merely for the purpose of selling merchandise, had no other means at its disposal to do the work involved in this case than to submit it to competent contractors, thus being compelled, in the accomplishment of this work, to commit it into the hands of those whose peculiar business it was to construct buildings. Having employed others who were recognized as proven to be skilled and competent in their profession, and having given proper directions and orders for the energetic and speedy execution of the work involved, and having provided that it should be done in a proper manner, it is apparent that the defendant under these instructions has chosen every means within its power for the careful and speedy execution of the work, and is, therefore, legally relieved from liability in the premises.

The ability, standing and reputation of the contractor was established by undisputed evidence, and the method employed in this case for doing the work was proven to have been scientific and in accord with the manner ordinarily used by expert builders, even though other methods had been proven which could have been resorted to, in order to accomplish the work in less time—which, however, was not established—that reason, nevertheless, would not have sustained the charge of undue diligence.

Plaintiff's counsel, in an elaborate brief, raises the question of the constitutionality of these party-wall statutes. For the purposes of this case, it is not absolutely necessary to consider this question, by reason of the fact that the work was done by an independent contractor. We are of opinion, however, that the Act of 1895, above referred to, is constitutional, even though it were in derogation of plaintiff's common-law rights, as claimed by him, and of which he argues he cannot be deprived by any statutory law. The Act under which the party wall proceedings in this case was had has been in operation since its enactment in 1895. Similar acts, granting like rights as party walls, have been enacted in the development of cities throughout this and other states, for a period so long that the public, in all probability, would be estopped from asserting or establishing its unconstitutionality. For as said by the Court, in Harrison's Estate, 250 Pa. 132, pertaining to the constitutionality of the act therein involved, and which has never been challenged:

"It would be a shock to the profession if it should now be determined for the first time that these acts were unconstitutional and void."

On the same subject, Justice Mitchell, in Sugar Notch Borough, 192 Pa. 358, said:

"It is not inappropriate to direct attention to the fact that this act (then before the Court for construction) has been in operation for twelve years, has been twice before the Court, and has been the ground of action many times before other courts, without objection to its constitutionality. It is rather late now to question it. While these circumstances are not conclusive in its

favor, yet they are a strong argument that it is not so plainly repugnant to the constitution as it must be to require a Court to overturn an Act of the Legislature."

In the light of these forcible suggestions, in addition to other principles prevailing in this case, we are not disposed to agree with plaintiff's counsel as to the unconstitutionality of the Act in question, even though it were the ruling question involved in the disposition of this motion, which it is not.

These principles are further emphasized by our Supreme Court, in the appeal of the Western National Bank, 102 Pa. 171-183, and Heron v. Houston, 217 Pa. 1, as follows:

"Every owner of a lot of ground * * * has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line, or a short distance therefrom."

And again, by Frazer, P. J., in McCarron v. O'Brien et al., 52 P. L. J. 40:

"As the law now stands, every person who becomes the owner of a lot of ground in a city of the second class, does so with the understanding that his lot is subject to the right of the adjoining owner to erect a party wall at any time, and he must also understand
192 that the right is not exhausted by the erection of a wall, as either owner may tear down the existing party wall which is unsuited for a proposed new building, and erect within reasonable grounds, a wider and stronger one."

It follows, therefore, that each and every owner takes and holds his ground subject to the right of the adjoining owner to erect a party wall. His property rights being circumscribed to that extent, and when an adjoining owner does put up a party wall, he takes no "property" belonging to his neighbor. He never had complete and unequivocal control or authority of the land adjoining the party wall, and the use of this by the adjoining owner is not an "injury to property." It is not the taking of private property for a private use, because the property rights were always limited by the existing easement in the strip of land adjoining the party wall.

Plaintiff, in his statement and on trial, planted his case upon the theory that whether the injuries arose from the negligent operation of the work done, or whether they were the direct, incidental and consequential result of the exercise of the right by defendant to build said party wall under the statute, that in either case he had the legal right to recover damages. This theory was not entertained by us at the trial. We held then, as we now do, that the plaintiff could only recover for injuries resulting from negligence or want of due diligence in the execution of the work. Plaintiff accordingly proceeded to submit testimony on the question of negligence, at the close of which the defendant moved for a non-suit on the grounds, (1) That
193 no evidence of negligence had been submitted; (2) that even though there had been, there was no evidence whatever to distinguish the character and the amount of damages resulting from the

lawful exercise of the right and those resulting from negligence or want of due diligence; and (3) because the work had been done by an independent contractor, who alone was liable.

The motion having been refused, defendant proceeded to establish its defense, at the close of which a motion for binding instructions was asked for by defendant, and refused, which refusal we are now of opinion was error and must be remedied by making absolute this rule for judgment N. O. V. A careful review of the entire record clearly discloses that there was no evidence of negligence or delay. Hence, there was nothing to submit to the jury on that subject, and if there had been, it would have been the negligence of the independent contractor, for which defendants are not liable in any event. That one phase of the case was, in our opinion, sufficient of itself to sustain defendant's request, irrespective of the other reasons assigned, which are subordinate to that ruling fact, to wit, the work in its entirety having been performed by an independent contractor.

It becomes unnecessary, therefore, to further analyze, elaborate or discuss the facts pertaining to the other reasons assigned, to wit, lack of proof of negligence or of unreasonable delay; any injuries resulting from the mere exercise of the right to build a party wall being, in our view of the law, damnum sine injuria. We might add that the question as to whether in such cases there can only be a recovery for damages arising by reason of negligence or delay, has never
194 been determined in Pennsylvania. It was raised, however, in two cases: first, in Lennig v. Dougherty, 45 Supr. 198, and again, in Buck v. Weeks, 194 Pa. 522, in both of which the question was considered as unnecessary to the disposition of those cases, and was, therefore, not passed upon. Until decided to the contrary by our Appellate Court, we see no reason why one exercising party wall privileges under the statute should be held liable for any damages resulting from negligence or delay, where the work agreed upon to be done is done by an independent contractor and is legal. We find that "The custom of party walls, developed by time and regulated by various statutes, was introduced into this country together with the process of foreign attachment, the custom of feme sole traders, and other customs of London, by the first settlers in Pennsylvania under William Penn, and in 1721, the Legislature of Pennsylvania passed an Act regulating in detail the whole subject of party walls in Philadelphia." This statute has been supplemented by very many others, extending the privilege to other counties, among which is the Act pertaining to cities of the second class, under which defendants proceeded.

"The practical wisdom," says Mr. Justice Read, in Vollmer's App., 61 Pa. 127, "of our colonial legislature one hundred and fifty years ago, laid the foundation of the Pennsylvania system of party walls, a great and radical improvement upon the principles of the common law, as expounded by the English courts, and those of Massachusetts and New York."

In the case of Deringer v. Augusta Hotel Co., 155 Pa., 609, Mr. Justice McCollum says:

"These statutes define the rights and duties of the owners
195 of lots in reference to the party wall, and in the absence of an agreement which renders them inapplicable, govern in the construction of it."

We might further refer, by way of analogy, to the case of Heinen v. Merrick, 41 La. Ann. 194:

"In demolishing the old and building the new wall, under the conditions proved in this case, plaintiffs exercised an absolute right conferred upon them by law. Under the maximum menimem loedit que jure suo utitur, they were not bound to indemnify their neighbor, for any inconvenience or injury necessarily occasioned by the exercise of the right. Such a work must, of necessity, incommode the neighbor. He cannot be prosecuted without an entering upon, and partial occupation of, his premises. It must disturb his enjoyment, and that of his tenants. It may give ground for the annulment of his leases, or for a diminution of rent. It may prevent the renting of the property. It may injure him in many ways, but so long and in so far as these injuries are inseparable from the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor."

This case was brought and tried on the theory of plaintiff, as already stated, that defendant's liability was independent of negligence or delay, but existed from the mere exercise of the right, and for this reason we presume no attempt was made by plaintiff to distinguish between those damages arising from negligence or delay and those damages which were the consequential result of the exercise of the statutory right, which fact alone, independent of all other questions involved, would justify the granting of the motion without other consideration. It is a conspicuous fact that in the
trial of this case the only important witnesses examined on
196 the question of damages sustained were the plaintiff and Mr. Steen, both of whom, in answer to the question presented as to each item of damages, claimed that it resulted from the mere exercise of the right and was incidental to the building of the wall.

We cannot concur with plaintiff's able argument that the statutory authority to erect party walls in no way avoids the common law right of recovery for an absolute trespass on another's property. Of course, we believe that if exercising the right in a violent or negligent manner, or with such delay as to intercept and prevent the occupation of the adjoining owner, on whose property the wall is built, or to wilfully destroy such property or its contents, that such not being a legal exercise of the right so conferred, should become the subject of compensation, but no such conditions were proven by the evidence in this case. It is nevertheless equally true that the mere entry on another's property, under the authority of the statute to build a party wall is not such an ordinary trespass as is claimed by plaintiff to exist at common law, but is distinguished from such mere entry when unaccompanied by acts of negligence. A careful analysis of the opinion of the Court, in McVey vs. Durkin, 136 Pa. 425, will, in addition to the foregoing citations, establish by analogy—if not absolutely—the correctness of this principle.

In view of the foregoing, we are of opinion that the motion in this case must prevail, and in this opinion all the judges who heard the arguments on this motion for judgment N. O. V. concur and I am so directed to state.

197 And now, to wit, September 15th, the motion for judgment n. o. v. is granted, and judgment for plaintiff is hereby reversed, and judgment directed to be entered in favor of the defendant.

BY THE COURT.

Eo die, Exception ex parte plaintiff is allowed and bill sealed.

JOSIAH COHEN, [SEAL.]
Trial Judge.

198 [Endorsed:] No. 1373, April Term, 1915. Edward F. Jackman v. The Rosenbaum Co. Opinion, Cohen, J. Prothonotary's Office, Allegheny County, Pa. Filed Sep. 15, 1917.

199 In the Supreme Court of Pennsylvania for the Western District.

Court of Common Pleas, County of Allegheny.

No. 1373, of April Term, 1915.

EDWARD F. JACKMAN, Appellant,

vs.

THE ROSENBAUM COMPANY.

Enter Appeal on behalf of Edward F. Jackman from the judgment of the Court of Common Pleas of the County of Allegheny.

WATSON & FREEMAN,
Attorneys for Appellant.

To George Pearson, Prothonotary of the Supreme Court of Pennsylvania, for the Western District.

COUNTY OF ALLEGHENY, *ss:*

Francis A. Wolf, of counsel for appellant, being duly sworn, saith that the above Appeal is not intended for delay but because Appellant believes he has suffered injustice by the judgment from which he appeals.

FRANCIS A. WOLF.

Sworn and subscribed before me this 22 day of December, A. D. 1917.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON, *Prothy.*

200 [Endorsed:] No. 33, October Term, 1918. Supreme Court of Pennsylvania, Western District. Edward F. Jackman, Appellant, vs. The Rosenbaum Company. Apeal and Affidavit. Filed Dec. 22, 1917. Supreme Court, W. D. Watson & Freeman, Attorneys for Appellant.

201 The Supreme Court of Pennsylvania, Western District.

COUNTY OF ALLEGHENY, *ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Edward F. Jackman from the judgment of your said Court at No. 1373 of —— Term, A. D. 1915, wherein the above appellant is plaintiff and The Rosenbaum Company is defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the second Monday of October 1918, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the 22nd day of December in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, Sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

JACOB COHEN, [L. S.]
Trial Judge. [L. S.]

202 [Endorsed:] No. 33, of October Term, 1918. Supreme Court. Edward F. Jackman, Appellant, v. The Rosenbaum Company. Certiorari to the Court of Common Pleas for the County of Allegheny, returnable the second Monday of October, A. D. 1918. Rule on the Appellee to appear and plead on the return Day of the Writ. George Pearson, Prothonotary. Prothonotary's Office, filed Dec. 22, 1917, Allegheny County, Pa. Filed Sep. 13, 1918. Supreme Court, W. D. Watson & Freeman, Attorneys for Appellant.

203 In the Supreme Court of Pennsylvania for the Western District.

No. 33, October Term, 1918.

EDWARD F. JACKMAN, Appellant,

vs.

THE ROSENBAUM COMPANY.

Assignments of Error.

1. The learned trial judge erred in charging the jury as follows (p. —):

"The plaintiff can only recover damages in the event that the defendant's exercise thereof was negligent, unreasonable and undiligent. Therefore, whatever loss plaintiff sustained which was inseparable from and incident to the exercise of the right already described, entitled plaintiff to no compensation. In other words, whoever exercises the right of erecting a party wall can only be made to respond in damages for injuries which could have been avoided by diligence and ordinary care in the manner of doing the work."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

204 2. The learned trial judge erred in charging the jury as follows (p. —):

"The right of maintaining a party wall as already stated, arises out of a provision of the law, and is a right to which all owners of real property in the City of Pittsburgh are subject, and in reference to which every man who taken a deed for property must be supposed to have accepted his deed, subject to the statutory right of his neighbor to build a party wall; the same as he takes it subject to the condemnation of his property by the right of eminent domain. Therefore, I again repeat, you will very carefully distinguish by the evidence between those damages resulting to the plaintiff which are the natural and consequent result flowing from the legal exercise of defendant's right, which entitle plaintiff to no damages, and compensate the owner only for such damages which you may find from the evidence to have resulted from negligence or from want of due diligence in the work that was done, or from the absence of the ordinary and reasonable care; and you must ascertain, gentlemen, from the evidence the cost of such, as distinguished from the cost of those injuries resulting from the mere exercise of the right without negligence or delay."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

3. The learned trial judge erred in charging the jury as follows (p. —):

"Now, the measure of damages in cases such as this, if
205 under the evidence as to negligence and want of due diligence there should be a recovery, is the cost of restoring the property to its former condition and compensation for the loss of its use. If you are not able to determine from the evidence or to distinguish thereby, those two results, to-wit: the natural incidental consequential damages arising from the exercise of defendant's legal rights from the damages incident to and resulting from negligence or want of due diligence and care, then your verdict should be for defendant;"

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

4. The learned trial judge erred in charging the jury as follows (p. —):

"If the property of plaintiff were so injured by the negligent operations of defendant as its proximate cause, you must find from the weight of the evidence as indicated the actual amount or reasonable cost of restoring such; distinguishing, as stated, between injuries arising from the mere exercise of the right and injuries resulting from negligence and want of diligence."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

5. The learned trial judge erred in his answer to plaintiff's additional request to charge the jury, which request and the answer thereto was as follows (p. —):

"That under the law and the evidence the verdict of the
206 jury should be for the plaintiff for the cost of repairs necessary to replace the eastern wall to its former condition.

Affirmed, if resulting from negligence or delay from want of ordinary, reasonable diligence."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except.

Exception allowed and bill sealed" (p. —).

6. The learned trial judge erred in refusing plaintiff's first request to charge the jury, which request was as follows (p. —):

"First. That under the Act of 1895, P. L. 139, relating to party walls in cities of the second class, where an existing wall is torn out in an adverse proceeding under said Act, the adjoining owner may recover the cost of putting his property back into the shape it was before the wall was removed without proving negligence against the other owner or the contractor constructing the party wall.

Refused."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

7. The learned trial judge erred in refusing plaintiff's second request to charge the jury, which request was as follows (p. —).

"Second. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements

on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is unconstitutional under the bill of rights
207 and the constitution of the State of Pennsylvania.

Refused."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

8. The learned trial judge erred in refusing plaintiff's third request to charge the jury, which request was as follows (p. —):

"Third. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States.

Refused."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

9. The learned trial judge erred in refusing plaintiff's fourth request to charge the jury, which request was as follows (p. —):

"Fourth. That the defendant's refusal and failure to replace plaintiff's building in the shape it was before the wall was turn out constituted negligence, in consequence of which the plaintiff is entitled to recover whatever sums were reasonably expended in
208 replacing his building in the condition it was before the wall was removed.

Refused."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

10. The learned trial judge erred in his answer to plaintiff's fifth request to charge the jury, which request and the answer thereto are as follows (p. —):

"Fifth. That the plaintiff is entitled to recover the fair rental value of his premises from the 1st of September, 1914, to the time when he could by the exercise of reasonable diligence put his property back into shape for occupancy, without proof of negligence.

Affirmed if the jury should find defendants were guilty of want of ordinary diligence in prosecuting the work."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

11. The learned trial judge erred in refusing the plaintiff's sixth request to charge the jury, which request was as follows (p. —):

"Sixth. If the jury should find that through the negligent operation of the defendant in the construction of this wall an unreasonable delay was caused, thereby causing the plaintiff to lose an opportunity of renting his property for the year beginning September

1st, 1914, the plaintiff is entitled to recover the fair rental
209 value of said premises for said year.
Refused."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

12. The learned trial judge erred in affirming the defendant's third request to charge the jury which request was as follows (p. —):

"3rd. Where the owner of a lot of ground situate in the City of Pittsburgh, in pursuance of his statutory right and in accordance with the provisions of the statute, goes upon the land of an adjoining owner and removes a wall so situated thereon as to prevent the erection of a party wall upon the line between the two properties, and erects a party wall in its place, he is not liable in damages for any inconvenience or injury necessarily occasioned by the exercise of the right. Such a work must of necessity incommode the neighbor. It cannot be prosecuted without an entry upon and a partial occupation of his premises. It must disturb his enjoyment and that of his tenant. It may prevent the renting of his property; it may injure him in other ways; but so long and in so far as these injuries are necessarily incident to the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor. Where a lot owner is in the exercise of a legal right the necessary results arising from the exercise of that legal right do not make him
responsible in damages if he should happen to injure the ad-
210 joining owner.
Affirmed."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

13. The learned trial judge erred in affirming the defendant's fourth request to charge the jury, which request was as follows (p. —):

"4th. The defendant company, having the right to build a party wall upon the line between the premises to be occupied by it and the theater building owned by the plaintiff, and having in the exercise of this right the further right to take down the old wall of the Duquesne Theater on the side nearest its property, is not liable to the plaintiff for whatever damages were suffered by the plaintiff which were necessarily incident to and followed from the removal of the old wall and the erection of the party wall in its place.

Affirmed."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

14. The learned trial judge erred in his answer to the defendant's eighth request to charge the jury, which request and the answer thereto are as follows (p. —):

211 "8th. For removing the wall of the theater and building the party wall and entering upon the premises of plaintiff for these purposes, and all work thereon necessarily incident thereto,

there can be no recovery, as it is damnum sine injuria and the verdict of the jury must be for the defendant.

Affirmed if there was no negligence or want of due diligence."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

15. The learned trial judge erred in his answer to the defendant's eleventh request to charge the jury, which request and the answer thereto, are as follows (p. —):

"11th. The defendant company was obligated in taking down the old wall and erecting the new party wall, to take only reasonable precautions to prevent unnecessary injuries to the plaintiff from the prosecution of the work, and to use reasonable diligence in prosecuting the same. Its whole duty was negative, that is, to do no unnecessary harm. It was not obligated to prevent harmful consequences in the exercise of its right to take down the old wall and erect a new party wall in its place. All that it was obligated to do, as a matter of law, was to exercise its right in such a way as not to unnecessarily injure its neighbor, to take reasonable care, and to use reasonable diligence in the prosecution of the work.

212 Affirmed: With the qualification that defendant was obligated to prevent 'harmful consequences' arising from negligence or want of due diligence."

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed" (p. —).

16. The learned trial judge erred in judgment in entering judgment in favor of the defendant n. o. v. which motion for judgment, the ruling of the court thereon and the plaintiff's exception thereto are as follows:

"And now, to wit, March 31, 1917, the Rosenbaum Company, the defendant above named, by Weil & Thorp, its attorneys, having presented a point for binding instructions in its favor at the trial of the above entitled case, and said point having been refused, move the court to have all the evidence taken upon the trial of said case duly certified and filed so as to become part of the record, and for judgment in favor of the defendant upon the whole record, according to the provisions of the Act of Assembly approved April 22, 1905, P. L. 286.

(Sgd.) WEIL & THORP,
Attorneys for Defendant.

Order of Court.

"And now, to wit, March 31, 1917, on motion of Weil & Thorp, attorneys for defendant, a rule is hereby granted on the plaintiff in the above entitled case to show cause why judgment should

213 not be entered for the defendant non obstante veredicto. It is further ordered that all the evidence taken upon the trial of the above entitled case be duly certified and filed so as to become part of the record.

(Sgd.) BY THE COURT."

"And now, September 15, 1917, the motion for judgment n. o. v. is granted and judgment for plaintiff is hereby reversed, and judgment directed to be entered in favor of the defendant, Eo Die, Exception allowed to plaintiff.

BY THE COURT.

Eo die, exception ex parte plaintiff is allowed and bill sealed.

JOSIAH COHEN, [SEAL.]
Trial Judge."

ERNEST C. IRWIN,
WATSON & FREEMAN,
Attorneys for Appellant.

214 [Endorsed:] No. 33, October Term, 1918. Edward F. Jackman, Appellant, vs. The Rosenbaum Company. Assignment of Error. Filed Sep. 13, 1918. Superior Court, W. D. Watson & Freeman, 66 St. Nicholas Bldg., Pittsburgh, Pa., Attys. for Appellant.

215 Supreme Court of Pennsylvania, Western District.

No. 33, October Term, 1918.

EDWARD F. JACKMAN, Appellant,

v.

THE ROSENBAUM COMPANY.

Appeal from C. P. of Allegheny County.

MOSCHZISKER, *J.*:

A proper consideration of the many important points involved in the present case requires unusually lengthy treatment; therefore, to facilitate a ready understanding of, and future reference to, this opinion, we have divided it into appropriate heads, as follows: (I) Statement of case, including contentions of parties, with positions and judgment of court below. (II) History of party-wall system, and legislation. (III) Police power and eminent domain. (IV) Constitutional points. (V) Applicable general principles and authorities, with comments on merits of case and relevant legislation. (VI) Cited cases commented upon and distinguished. (VII) Charges of negligence and defenses thereto, particularly that of independent contractor; final judgment.

I.

Plaintiff sued in trespass to recover damages for alleged injuries to the Duquesne Theatre, in the city of Pittsburgh, and other losses claimed to have been suffered by him as a consequence of the removal, by defendant, of an old wall, belonging to that building,

which ran along, but did not extend over, the division line between the properties of plaintiff and defendant, the latter requiring
216 the space occupied by the old wall for the purpose of erecting a party-wall for a large department store in course of construction upon its lot. Defendant originally contemplated incorporating the old wall into the new one; but the city authorities decided that the former was not sufficiently substantial for that purpose, and ordered its removal, which was done by the contractor in charge of the erection of defendant's building. Plaintiff claimed consequential damages only; he did not ask payment for the wall that was taken down, nor for his ground occupied by the new wall, nor compensation for material taken and applied to the purposes of the latter,—he sought to recover only for loss of rent and the cost of repairing and refitting the theatre. The verdict favored plaintiff; but defendant moved for judgment n. o. v., which was granted, and this appeal followed.

The party-wall proceedings were in accord with the provisions of the Act of June 7, 1895, P. L. 135, and plaintiff neither alleged nor endeavored to prove defendant had not strictly complied with the law; but claimed to recover upon the theory that, while defendant had the legal right to erect the new wall, and, if necessary, to cause the removal of all obstructions standing in its way, yet in so doing it became liable as an insurer for all damages, direct or consequential, caused by the work in question, whether through negligence or otherwise. Plaintiff also claimed in the court below, and contends here, that, if necessary to prove negligence, the evidence is sufficient to that end; and, further, that the defense of independent contractor is not applicable to a case of this character.

On the other hand, defendant contends that, in all matters concerned, it acted strictly within its legal rights, without negligence; and, further, if any negligence existed, either in the doing
217 of the work in question or through delay in its completion, this must be attributed to and charged against the contractor, who at all times proceeded without supervision or interference on part of defendant.

In entering judgment n. o. v., the court below determined that the party-wall system, as established in Pittsburgh, rested upon the police power of the State, and "injuries resulting from the mere exercise of the right to build a party-wall" were "damnum absque injuria"; at the same time, saying, as to the allegations of negligence: "We see no reason why one exercising party-wall privileges * * * should be held liable for any damage resulting from negligence or delay where the work agreed upon is done by an independent contractor and is legal"; and holding, "there was no evidence of negligence or delay [sufficient] to submit to the jury; [but] if there had been, it would have been the negligence of the independent contractor, for which defendant is not liable in any event." Additional grounds for entering the judgment are also given; but, since the two principal reasons just stated, if sound, are sufficient in themselves, we need not consider the others.

The first reason, in support of the judgment, that this is a case of damnum absque injuria, is, in substance, the court's answer to appellant's principal contention, which, before consideration thereof, we shall restate in the words of plaintiff's counsel, as follows: "We contend that the right to erect a party-wall upon the adjoining owner's land, being wholly statutory, is derogatory to common law rights; that such right is, therefore, to be strictly construed; that the statute authorizing the construction of such walls does not relieve the party building the wall from common law liability for dam-
218 ages; that a provision read into the statute permitting one man to invade another's land without liability for damages would be unconstitutional, as depriving an owner of his property without compensation and without due process of law, violating both the Constitution of Pennsylvania and the Constitution of the United States."

II.

To pass properly on the several points suggested by the contention just quoted, it is necessary briefly to review the foundations and development of the party-wall system in Pennsylvania. As stated in a note to Bloch v. Isham, 7 American Law Register (N. S.) 8, 11, "The custom of party-walls, developed by time and regulated by various statutes, was introduced into this country * * * by the first settlers in Philadelphia under William Penn; and, in 1721, the legislature of Pennsylvania passed an act * * * regulating in detail the whole subject of party-walls in the city of Philadelphia": see also Hoffstot v. Voight, 146 Pa. 632, 636.

The Act of February 24th, 1721, will be found in 1 Dallas's Laws of Pennsylvania, 152, 3 Pa. St. at L. 244, also 1 Sm. L. 125; and it will be noted therefrom that the meaning of the term "party-wall" is treated as then established, the statute merely undertaking to afford a remedy for the "diverse inconveniences, irregularities and controversies", which, as it states, "frequently happen in relation to party-walls".

The origin of our present party-wall regulations was the great London fire of 1666. They are primarily designed to guard life and property; and the theory which sustains these laws, as police statutes, seems to be that, in thickly populated cities, there is a constant menace from fire, against which they serve as a common protection: see Vollmer's Appeal, 61 Pa. 118, 125, et seq., where Mr. Justice
219 Read narrates the historical development of this branch of the law; also see Traute v. White, 46 N. J. Eq. 437, 441, and Gibbons on the Law of Dilapidations and Nuisances (1st Eng. ed., 1838) 110. Another theory, suggested by the United States Supreme Court as applicable to this class of cases (see Wurtz v. Hoagland, part "V" of this opinion, infra) is that, in congested districts, such regulations serve the public welfare by providing a common, economical means of using adjoining properties.

So far as Pittsburgh is concerned, the necessity for party-walls was

recognized, and their regulation provided for, in the first act of incorporation, passed April 22, 1794; see 3 Dallas's Laws 588, 591; 4 Carey & Bioren's Laws 421, 423; 15 St. at L. 161, 164, in connection with the act incorporating the Borough of Reading, to which this Pittsburgh statute refers: 11 St. at L. 124, 130; 2 Dallas's Laws 129; 2 Carey & Bioren's Laws 418, 424. The second act of incorporation, passed March 5, 1804, P. L. 199, 203 (17 St. at L. 648, 651), also contains provisions as to party-walls; as do the Acts of March 18, 1816, P. L. 160, 163, April 8, 1872, P. L. 986, and June 7, 1895, P. L. 135.

The Act of June 7, 1895, supra, regulating party-walls in cities of the second class, provides for the removal of an old party-wall, when "unfit or unsafe for the purpose of erecting a new building or buildings upon the adjoining lot" (P. L. 140), and how the expenses shall be borne; but there is nothing in this statute, or in the others called to our attention, that makes any provision whatsoever for the contingency of an old wall which, while standing upon one side of the division line between two properties, yet, as in the case at bar, occupies space needed for party-wall purposes. There
220 being no statutory liability for the damages here alleged, the question of the validity of plaintiff's claim must be worked out on general principles, and in the light of history; but before further consideration of the case from these aspects, we shall first dispose of the several objections to the judgment which appellant urges upon constitutional grounds.

III.

In taking up the points we are about to discuss, the following considerations must be kept in mind: Every act of sovereignty which, for the public welfare, adversely affects private property, whether under the right of eminent domain or otherwise, represents, in a broad sense, an exercise of police power; but, in Pennsylvania, as well as in most other jurisdictions, whenever, in the making of public improvements, real estate, or certain other kinds of private property connected therewith, are either actually appropriated or so affected as permanently to impair the value thereof (Iron City Auto Co. v. Pittsburgh, 253 Pa. 478, 493), such instances are segregated, and, for all legal purposes, in effect, classified under the head of "Eminent Domain", as to which there are many principles, restrictions and special constitutional rules inapplicable to police power cases in general, not the least significant of these being the right to damages for property thus taken, injured or destroyed.

IV.

As to party-wall acts in general, it is stated in 20 R. C. L. 1087, "The constitutionality of these statutes has been assailed on the ground that they authorize the taking of private property of another for private use, but they are generally upheld on the ground [of being] a valid exercise of the police power"; and this is the broad rea-

son given in our cases for sustaininig such legislation: Hoffstot v. Voight, 146 Pa. 632, 636; Heron v. Houston (No. 1), 217
221 Pa. 1, 3.

The following, perhaps rather broadly put, statement of general principle, from New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 462 (citing Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226, 255), that "Uncompensated obedience to a regulation enacted for the public safety under the police power of the State, is not a taking of property without due compensation", has relevancy here.

It has been decided repeatedly that the 14th amendment to the federal constitution does not limit the police power of the states. As said in 12 C. J. 1197, "The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, do not limit, and were not intended to limit, the subjects on which the police power of the state may lawfully be exerted; these guaranties have never been construed as being incompatible with the principle equally vital, because essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community": see cases there cited and Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 76; New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 462; also Nolan v. Union Storage Co., recently decided by us, but not yet reported.

Article 1, sec. 11, of our present state constitution, provides that "all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have a remedy by due course of law". The same provision is found in art. 9, sec. 11, of the constitutions of 1790 and 1838; but our decisions show that this has never been construed as conferring the right to recover consequential damages to property, due to the operation of the exercise of an act of sovereignty, police power or otherwise. That is to say, the word "injury" in this section of the constitution has been
222 construed uniformly in the strict sense of "legal injury"; and prior to 1874, only when land was actually appropriated for public purposes were damages recoverable, consequential losses, even in eminent domain cases, being accounted "damnum absque injuria": Case of P. & T. R. R. Co., 6 Wharton 25, 46; Monongahela Navigation Co. v. Coons, 6 W. & S. 101, 114-5; O'Connor v. Pittsburgh, 18 Pa. 187, 190; Freeland v. Pa. R. R. Co., 66 Pa. 91, 98; Fyfe v. Turtle Creek Borough, 22 Pa. Superior Ct. 292, 297; and other authorities mentioned in the note on page 210, 2nd col., vol. 1, of Stewart's Purdon's Digest. The present constitution (art. 16, sec. 8) first gave a universal right to recover damages for property injured or destroyed—not actually appropriated; but the operation of this provision is confined to that variety of cases, involving the exercise of an act of sovereignty affecting property, which is classified under the head of "Eminent Domain" (Chester County v. Brower, 117 Pa. 647, 656), and it in no manner refers to or affects cases (such as the one at bar) where incidental losses have been occasioned through an exercise of power, conferred in a police statute,

not of the eminent domain class: Betham v. Phila., 196 Pa. 302, 312.

Article 3, sec. 21, of the Pennsylvania constitution, providing that "no act of the general assembly shall limit the amount to be recovered * * * for injuries to * * * property", is called to our attention by plaintiff, who contends that "not only does this constitutional provision declare every man shall have a remedy for injuries to his property, but also that such remedy shall not be tampered with, limited or restricted"; and plaintiff argues that, if a construction is placed upon party wall legislation which denies the right to consequential damages, it in effect so limits "the amount to be recovered" in such instances, as entirely deprive one in his posi-
223 tion of a legal remedy. While, under this constitutional provision, no valid statutory limitations may be placed upon claims for injuries recoverable at law, yet it does not have, and cannot properly be given, the effect of conferring a right of recovery where none otherwise exists. Here (disregarding momentarily the element of negligence) the real question is, has plaintiff a right to recover against defendant consequential damages due to the mere building of the party-wall? If not, the provision under immediate consideration has no relevancy; which is all that needs now be said in reference thereto.

Although the police power is an essential attribute of government, which the constitution of Pennsylvania protects from abridgement (art. 16, sec. 3) yet attempts to produce, through its exercise, wrongful results, may of course be frustrated, especially when they run counter to adverse constitutional limitations (Leisy v. Hardin, 135 U. S. 100, 108, Lake Shore, etc. Co. v. Smith, 173 U. S. 684, 689; Eubank v. City of Richmond, 226 U. S. 137, 143); but, as we have shown in the preceding paragraphs, there is nothing in the constitutional provisions depended upon by plaintiff which, in themselves, when applied to the legislation here in question, subject defendant to a liability for damages, on the facts in this case. Therefore, since the statutes involved do not in terms place such obligation upon the defendant, if the liability exists, it must be because of relevant general principles of law, which we shall next examine.

V.

Defendant's entry upon the land of plaintiff, for the purpose of building a party-wall, having been made under and by virtue of the police power of the State, was lawful; the original entry
224 being lawful, the following general principles govern, and, as we shall show, effectually defeat, plaintiff's claim for damages: "It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others; this rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress": Cooley's Constitutional Limitations, 7th ed. 548.

"No cause of action arises from the doing of a lawful act or the exercise of a legal right, if done or exercised in a lawful and proper manner, the resulting damage, if any, being damnum absque injuria. A liability may, however, arise from the doing of a lawful act, or the exercise of a legal right in a negligent or improper manner; but in such cases the liability is based not upon the act done, but upon the manner of doing it. While there is an ancient maxim to the effect that one must so use his own property as not to injure another, the maxim, in its legal sense, has reference not to the mere infliction of damage, but to the violation of a right, and means only that one must so use his own as not to violate a legal right of another. Everyone has a right to the natural use and enjoyment of his own property, and, for lawful acts done by one person upon his own property in a lawful and proper manner, there is no cause of action, although damage to another may incidentally result therefrom": 1. C. J. 965 et. seq.

The building of party-walls upon division lines between lots in certain of the cities of this state, while regulated by statute, has developed into the ordinary and natural way to use and enjoy real estate of that character, to such an extent as to "become a
225 settled rule of property" (Heron v. Houston, No. 1, 217 Pa. 1, 3), and, in effect, to make applicable the principle that every man is entitled to the ordinary and natural use and enjoyment of his property without being responsible to his neighbors for inconvenience or incidental losses which they may suffer through such enjoyment: see, on this general principle, Penna. Coal Co. v. Sanderson, 113 Pa. 126, 145; Penna. R. R. Co. v. Lippincott, 116 Pa. 472, 482 et seq.; and, on its application to a party-wall case, Negus v. Becker, 143 N. Y. 303, 308 et seq.

If it be said the building-owner of a party-wall (meaning the one at whose instance the wall is constructed) uses not only his own property but also that of his neighbor, the answer is: In communities where party-walls have for generations been recognized and regulated by legislation, such as the cities of Philadelphia and Pittsburgh, each adjoining lot owner, for party-wall purposes, has what is tantamount to an easement of support in the premises of his neighbor (see note to Bloch v. Isham, 92 American Decisions 287), to the full enjoyment of which he is entitled whenever he erects a wall of that character; and, when either lot-holder builds upon his own property up to the division line, he does so with the knowledge that, in case of the erection of a party-wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall. This is "no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation
226 by a boundary more substantial than a mathematical line": Evans & Watson v. Jayne, 23 Pa. 34, 36. The present proposition comes to this: The strip of land, the middle of which constitutes the dividing line between plaintiff's and defendant's properties, was dedicated, in theory of law, for party-wall use; and,

when so desired by either of the respective owners, neither could, without the consent of the other, prevent its occupation for that purpose.

As declared in Heron v. Houston (No. 1), 217 Pa. 1, 4, citing Western National Bank's Appeal, 102 Pa. 1[illegible] "this right (of easement) cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom"; for the right to construct a party-wall on the ground thus occupied by him "arises out of a provision of the law to which all owners of real property * * * are subject, and in reference to which all conveyances * * * must be supposed to have been made and accepted": Barns v. Wilson, 116 Pa. 303, 307. Therefore, defendant committed no trespass against plaintiff when he entered upon his land; on the contrary, defendant, in so doing, exercised merely a lawful right conferred upon him by valid police statutes.

That the acts of assembly here in question are properly classed as valid police statutes, it is now too late to doubt (Heron v. Houston, supra); but, even aside from this, we cannot sustain plaintiff's contention to the effect that, when absolute immediate danger to the public is not present, then all "excuse for a taking or destruction of property without compensation is absent"; for the Pennsylvania view is not so extreme. In Fidelity, etc., Co. v. Fridenburg, 175 Pa. 500, 507, 508, a regulation requiring fire escapes on certain structures, in order to avert a possible remote catastrophe, is treated as a valid exercise of the police power, and, in Com. v. Plymouth Coal Co., 232 Pa. 141, 150, a statutory provision that obliges owners of
227 adjoining coal properties to leave pillars along the division line, so as to avoid possible future dangers, is held, under the police power, not to be an unconstitutional taking of property without compensation. In Phila. v. Scott, 81 Pa. 80, 86, we say that legitimate exercise of the police power is "generally based upon disaster, fault or inevitable necessity"; and, as hereinbefore noted, the ever present menace from fire, in thickly populated cities, justifies and sustains our party-wall system, and the legal results which flow therefrom, on the theory of inevitable necessity.

If it be said that the dangers from fire may be amply provided against in other ways, the answer is that, since the ordained method presents a long established, oft approved and reasonably proper, means to accomplish the desired purpose, which, in congested districts (where, for the public welfare, it is desirable and necessary to economize land space) contributes to the common, economical management of adjoining properties, its validity, as a proper police measure cannot successfully be attacked.

In connection with the thought just suggested, concerning the right to use the police power of the state to work out a common scheme for the economical management of adjoining properties, see Wurtz v. Hoagland, 114 U. S. 606, 611 (involving the constitutionality of a state law for the common drainage of adjacent lands), where Mr. Justice Gray, quoting from another case, states: "But there is another branch of legislative power that may be appealed to

* * *, the power of the government to prescribe public regulations for the b tter and more economical management of property of persons whose properties adjoin * * *; such as the power of regulating the building of party-walls, making and main-
228 taining party-fences and ditches. * * * This is a well known legislative power, recognized and treated of by all jurisconsults and writers upon law throughout the civilized world; a branch of legislative power exercised * * * before and since the revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our courts." Upon the application of this power to a land irrigation case, see Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 163, where it is said: "In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners, for what is declared upon the whole to be for the public benefit." Of course, where such an operation of the police power amounts to an exercise of the right of eminent domain, the rules and principles commonly applicable to the latter class of cases apply; but not otherwise.

The method here adopted to advance the public welfare being a valid one, which is not even contended to be, in any sense, an exercise of eminent domain, the question is, has plaintiff, in the absence of legislation giving the right to recover damages, a present common law right in that regard, which the courts should enforce. In searching for an answer to this question, we should not approach the point as though the act of 1895, supra, were the origin of Pennsylvania's party-wall system (which, in a measure, appellant does), when, as a matter of fact, our legislation upon that subject antedates the foundation of the Commonwealth. Although the system may have originated in English statutes, it (as stated by our
229 brother Stewart in Heron v. Houston, supra) has "become," by enactment and re-enactment, acceptance and long acquiescence, a "settled rule of property," where applicable in this state; moreover, it was such long before any of the rights now insisted upon by plaintiff became fixed or established; and, thereunder, such an act of entry as here complained of against defendant was entirely lawful,—which historical fact should be taken into account in considering plaintiff's several propositions. Even the Constitution of the United States must be read in the light of the history of the law as it previously existed (Smith v. Alabama, 124 U. S. 465, 478; U. S. v. Wong Kim Ark, 169 U. S. 649, 653-4); and thus plaintiff's alleged common law rights must be viewed.

The fundamental principles of the common law, while in a manner liable to expansion, are in essence unchangeable, but their applicability to given conditions necessarily varies according to changes wrought by usage or statutory enactment; and, pursuing this thought, what today is a trespass, may, by development of law, not be so tomorrow. Therefore, it will not do to say (as plaintiff does) since, once upon a time, at common law, the uninvited entry upon the land of a neighbor, to build a party-wall, would have been a tort, giving rise to a claim for damages, that at the present day such an

act has all the attributes of a common law trespass, except those expressly removed by statute, and, as the statute now before us does not specifically deprive plaintiff of his right to damages, that this particular attribute still adheres; for the contention overlooks the all important fact that, under present conditions, the law views an entry of this character as constituting no wrongful, but a wholly rightful act. Hence, the only general principles or common law rules applicable, are those relevant to acts of the former, and not of the latter character. This being so, the case cannot properly
230 be looked at from the angle which plaintiff would have us take, but must be viewed thus: At common law, before the necessity for party-walls was recognized, for one to attempt, without leave, the construction of a wall of that character partly on the land of his neighbor would, of course, have been a trespass, upon the commission of which a right to damages immediately ensued. When, however, the necessity for party-walls in thickly populated districts was recognized, and their construction authorized and regulated, such an entry no longer constituted a trespass, and, if proceeded with according to prescribed methods, in the absence of harmful negligence, the building-owner, acting by lawful authority, could not be held answerable for consequential damages. In other words, when the building-owner's act, in going upon the land of his neighbor, became lawful (as it always has been in the jurisdiction here in question), different common law principles applied, under which the right to damages, that had followed in the wake of what before was a tort, ceased to exist; and thereafter no damages could be recovered for such an entry, or for lawful acts rightfully done pursuant thereto, until so ordained by the law-making power.

The present case does not involve the removal of an old party-wall, in the building of the new one, and we do not intend in any manner to pass upon the efficacy of the provision, contained in the acts of assembly applicable to cities of the first class, concerning the liability for damages, in such instances, on the part of the building owner to the adjoining owner; but, since there is no such provision in the Act of 1895, supra, as to cities of the second class, its presence in the other statutes may be noted as a legislative recognition of the necessity therefor, if it were desired to make damages of any kind recoverable under the operation of such legislation; and, in
231 this connection, it may be further noted, as a cumulative suggestion, that, when a real party-wall, occupying the division line between two properties, has once been actually constructed, if, owing to changed conditions, a larger one is required, or for any other good and sufficient reason the original wall is subsequently taken down by either owner, such a case presents, on the merits, a stronger legislative reason for allowing damages to the non-consenting owner than an instance like the one before us, where the old, removed wall, occupying land on only one side of the division line, is not in fact a party-wall, and, therefore, must have been erected with full knowledge on the part of its owner that, some day in the future, it might have to make way for a wall of that character.

Party-wall legislation must be strictly construed (Hoffstot v.

Voight, 146 Pa. 632, 636); but one cannot by any proper character of construction put something into statutes which is absent therefrom, and, as previously said, there is nothing in the present relevant acts of assembly which either directly or indirectly confers a right upon plaintiff to recover damages, on the facts in this case; neither can his alleged right in this respect be worked out on relevant common law principles nor by force of the constitutional provisions depended upon by him; therefore, he has no warrant for recovery, and the court below did not err in so deciding.

To sum up our consideration of points thus far discussed: The party-wall system represents a valid exercise of police power, and, thereunder, all persons in the old city of Pittsburgh hold their lands subject to the right of adjoining owners to construct such walls; on the facts in this case, the exercise of that right does not constitute either a taking or injury of property, within the constitutional meaning of those terms, nor is it in any sense a trespass;
232 hence (aside from all questions of negligence), in the absence of a legislative provision conferring the right to recover damages, the present plaintiff is not entitled thereto.

VI.

Two cases from the common pleas of England, cited by appellee, i. e., Bryer v. Willis, 23 Law Times Report 463, and Thompson v. Hill, 22 id. 820, indicate that, at the present day, in that country (in the absence of negligence or delay) the building-owner of a party-wall is not responsible to his neighbor for consequential damages: and Heine v. Merrick, 41 La. Ann. 194, 206, rules that, in demolishing an old wall and building a new party-wall, the building-owner exercises an absolute right conferred upon him by law, and is "not bound to indemnify his neighbor for any inconveniences or injury necessarily occasioned by the exercise of the right." There the court states: "Such a work must, of necessity, incommode the neighbor * * *; it may injure him in many ways, but so long and insofar as these injuries are inseparable from the exercise of the right, the neighbor is bound to submit to them and can claim no indemnity therefor." The case last cited being from Louisiana, the decision is influenced, ex necessitate, by local legislative provisions and the principles of the French law; but, as stated by us in Evans & Watson v. Jayne, 23 Pa. 34, 36, there are marked points of similarity between the French party-wall system and our own: as to this, see Washburn on Easements, 4th ed., 623, 629, 630. Moreover, so far as the report shows, there does not seem to be any radical local legislative differences to distinguish the case under discussion from the one at bar.

233 The case, which, on its facts, most nearly approaches the present one is Fowler v. Saks, 7 Mackey (D. C.) 570, 575, 581, cited by appellant, where recovery of damages was allowed; but, the regulations for the District of Columbia expressly provide that the builder of a party-wall shall pay all damages thereby occasioned to

the adjoining owner. Only one case, McKeon v. N. Y., etc., R. R. Co., 75 Conn. 343, 346, 347, has been cited to us where, in the absence of any such special provision as to damages a recovery was allowed for losses occasioned by, what the court there refers to as, an exercise of the police power; but, while the subject of police power is discussed, it is plain that Judge Baldwin, who wrote the opinion, decided the case (in no sense relating to party-walls) on the theory that the damages in question were due to an exercise of the right of eminent domain. Besides, much of the law laid down in this Connecticut case is contrary to the Pennsylvania view, as recently announced in the somewhat similar case of Iron City Auto. Co. v. Pittsburgh, 253 Pa. 478, 493 et seq.

There seem to be but two Pennsylvania cases that in any manner directly discuss the question of an adjoining owner's right, in the absence of negligence, to recover from the building-owner of a party-wall damages occasioned by the removal of an old wall, namely, Lennig v. Dougherty, 45 Pa. Superior Ct. 198, 202, and Buck v. Weeks, 194 Pa. 522, 524, both of which arose in Philadelphia, where the relevant acts of assembly, referring to cities of the first class, expressly provide that, when an old party-wall is removed for the purpose of erecting a new one, the building-owner shall "make good all damages occasioned thereby to the adjoining premises"; but in neither instance was the question as to damages determined.

234 Before taking up the next subject for consideration, the defense of independent contractor, we may state that, owing to the length of this opinion, it does not seem expedient to undertake a discussion of all the numerous cases cited by counsel; but they have been examined, and those not herein mentioned, where recovery is allowed, either involve abortive attempts at the exercise of the police power, held to be, in reality, but instances of the exercise of the right of eminent domain, or they are cases involving an avowed exercise of the latter right; or, if not within either of these classes, then they are otherwise distinguishable on one of two grounds, namely, because the relevant legislation expressly conferred a right to damages, or because actual negligence was proved. For instance (referring to the last mentioned group), in McVey v. Durkin, 136 Pa. 418, 424, where this court sent the case back for re-trial, we reduced and, in effect, limited the issues to an inquiry concerning the "careless manner in which the latter work [taking down the old wall] was prosecuted" and the resultant damages therefrom.

VII.

As to plaintiff's contention that, if negligence must be shown to entitle him to recover, the proofs are sufficient it need only be said we concur with the learned court below in finding the evidence inadequate to sustain a verdict on the theory of negligent delay; and, so far as we are concerned with the responsibility of defendant for the alleged negligent manner in which the work was carried on, the following summing-up from the opinion of Judge Cohen covers that

phase of the case: "Defendant having employed others, who
235 were recognized as, and proved to be, skilled and competent in their profession, and having given proper directions * * * for the energetic * * * execution, in a proper manner * * * of the work involved * * *, it is apparent that defendant * * * is, therefore, legally relieved from liability in the premises."

As said in the somewhat similar case of Negus v. Becker, 143, N. Y. 303, 310, "The performance of the work contracted for was neither dangerous, nor extraordinary, in itself, and hence the rule applies that for an injury resulting to another by reason of a negligent performance the remedy is solely against the contractor."

Of course, if defendant were under "the liability of an insurer to plaintiff," as the latter claims, then the former could not escape its obligation by the employment of a contractor; but, since we have decided that, under our law, no such liability exists, cases from other jurisdictions, where the relevant acts of assembly place the responsibility of an insurer to the adjoining owner upon the builder of a party-wall, are irrelevant, and the established principles applicable to the defense of independent contractor govern: as to these generally, see Painter v. Pittsburgh, 46 Pa. 213, 221; Harrison v. Collins, 86 Pa. 153, 159; Miller v. Merritt, 211 Pa. 127, 134, and, on the application thereof to cases involving party-walls, see Earl v. Beadleston, 42 N. Y. Super. Ct. 294, 299, 300; Engle v. Eureka Club, 137 N. Y. 100, 105; and Butler v. Hunter, 7 H. & N. 825, 826, 832, where Pollock, C. B., says, inter alia, "It must be assumed that directions were given to do the work in the ordinary way, and to take all proper precautions not to cause any mischief; no doubt, where the act is in itself a nuisance, the party who employs another to do it is
236 responsible for all the consequences * * *, but where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible unless the relation of master and servant exists," all of which is pertinent to the case at bar.

The assignments of error are overruled and the judgment is affirmed.

237 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinon in the case of Edward F. Jackman, Appellant vs. The Rosenbaum Co. at No. 33 October Term, 1918 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this fourteenth day of January in the year of our Lord One Thousand Nine Hundred and Nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

238 [Endorsed:] No. 33, October Term, 1918. Edward F. Jackman, appellant vs. The Rosenbaum Company. Exemplification. Prothonotary's Office, Allegheny County, Pa. Filed January 14, 1919.

239 The Supreme Court of Pennsylvania, Western District.

COUNTY OF ALLEGHENY, *ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. — for the County of Allegheny, Greeting:

Whereas, by virtue of our Writ of Certiorari to No. 33 of October Term, 1918, of our Court, a record in the matter of the appeal of Edward F. Jackman from the judgment of your said Court at No. 1373 of April Term, A. D. 1915, was brought into our Supreme Court and the said cause was there so proceeded in that on the 4th day of January, A. D. 1919, the following decision was rendered, viz.:

The assignments of error are overruled and the judgment is affirmed.

MOSCHZISKER, *J.*

Wherefore, we hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our Supreme Court at Pittsburgh, the 14th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON, *Prothonotary.*

240 [Endorsed:] No. 1373, April Term, 1915. No. 33, October Term, 1918. Supreme Court. Edward F. Jackman, Appellant, v. Rosenbaum Company. Remittitur. Prothonotary's Of-

fice, Allegheny County, Pa. Filed Jan. 14, 1919. Costs, Attorney, $3.

241 *Docket Entries.*

In the Supreme Court of Pennsylvania, Western District.

EDWARD F. JACKMAN, Appellant,

vs.

THE ROSENBAUM COMPANY.

Appeal from the Court of Common Pleas, Allegheny County, at No. 1373, of April Term, 1915.

Appeal and Affidavit filed and Writ exit December 22, 1917.
September 13, 1918, Assignments of Error filed.
Eo die, Record filed.
October 15, 1918, Argued.
January 4th, 1919,

The assignments of error are overruled and the judgment is affirmed.

MOSCHZISKER, *J.*

January 14th, 1919, Remitted.

Messrs. Watson & Freeman, Pittsburgh, Pa., Attorneys for Appellant.

242 In the Supreme Court of Pennsylvania for the Western District.

Court of Common Pleas, County of Allegheny.

No. 1373, April Term, 1915.

EDWARD F. JACKMAN, Appellant,

v.

THE ROSENBAUM COMPANY.

Supplemental Certiorari.

Issue Certiorari to the Court of Common Pleas No. — of the County of Allegheny to remove the record and proceedings in a certain action in the said Court at above number and term between the parties hereinbefore recited. The record aforesaid being required by the

Supreme Court for further proceedings therein, as provided by Section 18 of the Act approved 19 May, 1897, P. L. 67.

H. F. STAMBAUGH,
WATSON & FREEMAN,
Attorney- for Appellant.

To George Pearson, Prothonotary Supreme Court, Western District.

243 [Endorsed:] No. 33, October Term, 1918. Supreme Court of Pennsylvania, Western District. Edward F. Jackman, Appellant, v. The Rosenbaum Company. Præcipe for Certiorari. Filed Mar. 12, 1919, Supreme Court. H. F. Stambaugh, Watson & Freeman, Attorneys for Appellant.

244 *Supplemental Certiorari.*

The Supreme Court of Pennsylvania, Western District.

COUNTY OF ALLEGHENY, *ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain further proceedings in the Supreme Court in the matter of appeal of Edward F. Jackman from the judgment of your said Court, at No. 1373 of April Term, A. D. 1915, wherein the above appellant is plaintiff and The Rosenbaum Company is defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought, as provided in section 18 of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 12th day of March, in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

—— ——. [L. S.]
—— ——. [L. S.]

245 [Endorsed:] No. 33 of October Term, 1918. Supreme Court. Edward F. Jackman, Appellant, v. The Rosenbaum Company. Supplemental Certiorari to the Court of Common Pleas for the County of Allegheny, returnable forthwith. Rule on the Appellee to appear and plead on the return Day of the Writ. George Pearson, Prothonotary. H. F. Stambaugh, Watson & Freeman, Attorneys for Appellant.

246 *Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, for the Western District thereof, do hereby certify that the foregoing Record, pages 1 to — inclusive, is a true and faithful copy of the Record and Proceedings of the Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Edward F. Jackman — appellant and The Rosenbaum Company — appellee.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 7th day of April, in the year of — Lord one thousand nine hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

247 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said the Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 7th day of April, in the year of our Lord one thousand nine hundred and —.

J. HAY BROWN.

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania in and for the Western District, do certify, that the Honorable J. Hay Brown by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said the Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 7th day of April, in the year of our Lord one thousand nine hundred and nineteen.

GEORGE PEARSON.

248 In the Supreme Court of the United States.

No. —, October Term, 1918.

EDWARD F. JACKMAN, Plaintiff-in-Error,

vs.

THE ROSENBAUM COMPANY, a Corporation under the Laws of the State of Pennsylvania.

Petition for Writ of Error to Supreme Court of Pennsylvania.

To the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States:

Now comes Edward F. Jackman, petitioner above named, and represents that on the 4th day of January, 1919, the Supreme Court of the State of Pennsylvania rendered a final judgment against your petitioner, affirming the judgment entered by the court of Common Pleas of Allegheny County, Pa., in a certain cause, wherein your petitioner was plaintiff and The Rosenbaum Company, a corporation under the laws of the State of Pennsylvania, was de-
249 fendant, and awarding costs in favor of said The Rosenbaum Company, as will appear by reference to the record in the proceedings in said cause; and that said Supreme Court is the highest court in the State of Pennsylvania in which a decision in said cause could be had.

The said suit in the State court was an action, brought by your petitioner, as plaintiff, to recover damages from the defendant, in which the following facts appeared:

In the year 1914, your petitioner was the owner of a large theater in the City of Pittsburgh, erected on a lot immediately adjoining a tract of land owned by the defendant; defendant proceeded to erect a large, 12-story department store on its tract, and, in the exercise of an asserted right, under an Act of Assembly of the State of Pennsylvania, approved June 7th, 1895, P. L. 139, in relation to party

walls, tore down and removed the foundation and wall of your petitioner's theater, on the side adjoining the property of the defendant. Said foundation and wall, so removed, had been erected entirely within the boundary line of your petitioner, and the defendant, in lieu thereof, constructed a foundation wall, suitable for a large department store, extending downward 30 feet below the curb of the street, and extending across the boundary line into the land of your petitioner for a distance of 7½ feet, and on this foundation erected, to a height of 12 stories, a 13 inch wall, half of which was
250 located on your petitioner's property.

Your petitioner was compelled to expend the sum of $18,850.31, in replacing the property of your petitioner, removed and destroyed by the defendant in the erection of said party wall, and, in addition, offered evidence, at the trial of the cause, showing that he had sustained a loss of $11,500, through inability to rent the property during the period intervening between the removal of said wall of your petitioner by defendant, and the restoration by your petitioner of his theater building.

At the trial of the case, the jury rendered a verdict in favor of your petitioner in the sum of $25,000.

At the close of the evidence in said trial, your petitioner requested the trial judge to instruct the jury that said Act of June 7th, 1895, P. L. 135, if interpreted to exclude the recovery of damages caused by the removal of your petitioner's wall, in the absence of proof of negligence, was void, as being contrary to the 14th Amendment to the Constitution of the United States.

The trial judge refused to give said instruction, and, on the contrary, charged the jury that the injury to your petitioner was damnum sine injuria, if there was no negligence on the part of the defendant.

Subsequently, on motion of defendant, the court of com-
251 mon pleas of Allegheny County, Pennsylvania, set aside the verdict in favor of your petitioner, and entered judgment non obstante veredicto in favor of the defendant, holding that there was not sufficient evidence of negligence on the part of the defendant to sustain a recovery, and that by virtue of the provisions of said Act of June 7th, 1895, P. L. 135, the injury to your petitioner, caused by the removal of the wall of his theater, was damnum sine injuria, in the absence of proof of negligence.

On appeal to the Supreme Court of Pennsylvania, your petitioner assigned, as error in the judgment of the court below, the refusal of the trial judge to give the instruction above cited, and said assignment of error was overruled by the Supreme Court of Pennsylvania, which affirmed the judgment of the lower court, and entered judgment in favor of the defendant.

And your petitioner further affirms that, in the aforesaid judgment and proceedings, certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignments of error which *is* filed herewith.

Wherefore, your petitioner prays that a writ of error, from the Supreme Court of the United States, may issue in this case, to the Su-

preme Court of the State of Pennsylvania, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated by the Clerk of the Supreme Court of the State of Pennsylvania, may be sent
252 to the Supreme Court of the United States, as provided by law.

H. F. STAMBAUGH,
JOHN M. FREEMAN,
Attorneys for Petitioner.

253 In the Supreme Court of the United States.

No. —. October Term, 1918.

EDWARD F. JACKMAN, Plaintiff-in-Error,

vs.

THE ROSENBAUM COMPANY, a Corporation under the Laws of the State of Pennsylvania.

Assignments of Error.

Now comes Edward F. Jackman, plaintiff in error, and respectfully submits that in the record proceedings and final judgment of the Supreme Court of the State of Pennsylvania in the above entitled cause, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Pennsylvania erred in holding that an act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said court, was constitutional and did not violate the Fourteenth Amendment to the constitution of the United States.

Second. The Supreme Court of the State of Pennsylvania
254 erred in not holding that an Act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said court, deprived the plaintiff in error of his property without due process of law and was in violation of the Fourteenth Amendment to the constitution of the United States.

Third. The Supreme Court of the State of Pennsylvania erred in not holding that an act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said court, denied to the plaintiff in error the equal protection of the laws and was in violation of the Fourteenth Amendment to the constitution of the United States.

Fourth. The Supreme Court of the State of Pennsylvania erred in not sustaining the Eighth assignment of error filed by this plain-

tiff in error as appellant in said court, which assignment of error was as follows:

"The learned trial judge erred in refusing plaintiff's third request to charge the jury, which request was as follows:

"'Third. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the im-
255 provements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States. Refused.'

"To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed."

Fifth. The Supreme Court of the State of Pennsylvania erred in entering final judgment as follows:

"Jan. 4, 1919.—The assignments of error are overruled and the judgment is affirmed.

MOSCHZISKER, *J.*"

The judgment of the trial court so affirmed was as follows:

"And now, September 15, 1917, the motion for judgment n. o. v. is granted and judgment for plaintiff is hereby reversed, and judgment directed to be entered in favor of the defendant. Eo die, exception allowed to plaintiff.

BY THE COURT.

"Eo die, exception ex parte plaintiff is allowed and bill
256 sealed.

JOSIAH COHEN, [SEAL.]
Trial Judge."

Wherefore your petitioner prays that the judgment of the Supreme Court of the State of Pennsylvania may be reversed.

H. F. STAMBAUGH,
JOHN M. FREEMAN,
Attorneys for Plaintiff-in-Error.

257 [Endorsed:] No. —, Oct. Term, 1918. Edward F. Jackman, Plaintiff-in-error, vs. The Rosenbaum Company, a corporation under the laws of the State of Pennsylvania. Petition for Writ of Error and Assignments of Error. Filed Mar. 12, 1919, Supreme Court, W. D. H. F. Stambaugh, John M. Freeman, 66 St. Nicholas Bldg., Pittsburgh, Pa., Attys. for Plaintiff-in-Error.

258 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Pennsylvania, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward F. Jackman, as plaintiff, and The Rosenbaum Company, a corporation under the laws of the State of Pennsylvania, as defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
259 States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Edward F. Jackman as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Tenth day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

260 [Endorsed:] Supreme Court of the United States, October Term, 191–. —— —— vs. —— ——. Writ of Error. Filed Mar. 12, 1919, Supreme Court, W. D.

261 UNITED STATES OF AMERICA, *ss:*

To The Rosenbaum Company, a corporation under the laws of the State of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania for the Western District, wherein Edward F. Jackman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this Tenth day of March, in the year of our Lord one thousand nine hundred and nineteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

262 The within citation served on us this March 12th, 1919.

WEIL & THORP,
Attorneys for The Rosenbaum Co.

A. LEO. WEIL,
Of Counsel.

[Endorsed:] Filed Mar. 12, 1919, Supreme Court, W. D.

Endorsed on cover: File No. 27052. Pennsylvania Supreme Court. Term No. 345. Edward F. Jackman, plaintiff in error, vs. The Rosenbaum Company. Filed April 9th, 1919. File No. 27052.

SEP 21 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, [redacted] 1922
NO. [redacted]3

EDWARD F. JACKMAN, Plaintiff-in-Error,

vs.

THE ROSENBAUM COMPANY.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF PLAINTIFF-IN-ERROR.

H. F. STAMBAUGH,
ERNEST C. IRWIN,
JOHN M. FREEMAN,
Attorneys for Plaintiff-in-Error.

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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Supreme Court of the United States

OCTOBER TERM, 1921.
NO. 14.

EDWARD F. JACKMAN, Plaintiff-in-Error,

vs.

THE ROSENBAUM COMPANY.

In Error to the Supreme Court of the State of Pennsylvania.

Statement of the Case.

Since 1889, plaintiff-in-error has been the owner of a tract of land fronting 87 feet on Penn Avenue and 112 feet in depth, in the City of Pittsburgh, which immediately adjoins a tract owned by the defendant-in-error (Rec. 54). On this property was erected a large theatre, known as the "Duquesne Theatre." No party wall had been erected on the line between the two properties. The foundation and wall of the theatre adjacent to the property of the defendant-in-error had been erected and stood entirely within the boundary line of plaintiff-in-error's property and no part extended over on the property of the defendant-in-error.

In 1914, the defendant-in-error proceeded to erect a large twelve-story department store on its tract, and in the exercise of an asserted right under Section 9 of the Act of Assembly of the State of Pennsylvania, approved June 7, 1895, P. L. 135, in relation to party walls, tore down and removed the foundation and wall of the plaintiff's theatre on the side adjoining the property of the defendant-in-error. This foundation wall of the plaintiff-in-error, as already stated, was erected entirely within the boundaries of his property. It extended only seven feet below the curb of the street (Rec. 12). In lieu thereof, defendant-in-error constructed foundations suitable for a large department store, consisting of large concrete piers which were fifteen feet thick and half of which stood on the land of the plaintiff-in-error. These piers extended across the boundary line into the land of plaintiff-in-error for a distance of seven and a half feet and downward thirty-three feet below the curb of the street. On these foundations the defendant-in-error erected a steel structure carrying a thirteen inch wall to a height of twelve stories—eight stories or one hundred feet above the roof of the theatre, and half of this wall was likewise located on the plaintiff-in-error's property (Rec. 15-18).

In order to erect this so-called party wall, defendant-in-error entered upon the property of the plaintiff-in-error and tore down the side of the wall adjoining the latter's property. Defendant-in-error broke through this wall on June 6, began to tear it down about July 21, and had carried the new or party wall up to the level of the roof of plaintiff-in-error's theatre about September 15 (Rec. 15-16). Both the old wall of the

theatre and the new or party wall extended along the dividing line for the full depth of these lots, or 112 feet (Rec. 24). Plaintiff-in-error was compelled to replace plumbing and heating systems, fire extinguishing system and marble work of lobby and entrance to gallery which had been torn out, re-lay floors which had been torn up, repair the stage of the theatre where it had been broken by the defendant-in-error, repair the roof which defendant-in-error had broken through, and make other necessary repairs and changes to restore his theatre to a tenantable condition (Rec. 28-31, 55).

Plaintiff-in-error brought an action of trespass to recover damages, and introduced evidence to show, *inter alia*, that he had expended the sum of $18,850.31 in replacing property removed and destroyed by defendant-in-error in the erection of the party wall. In addition, he offered evidence that he had sustained a loss of $11,500 through inability to rent the property during the period intervening between the removal of said wall of the plaintiff-in-error and the restoration by him of his theatre building (Rec. 35-42; 64-66).

At the close of the evidence in said trial, the plaintiff-in-error requested the trial judge to instruct the jury that said Act of June 7th, 1895, P. L. 135, if interpreted to exclude the recovery of damages caused by the removal of his wall and the erection of the party wall on his land, in the absence of proof of negligence, was void, as being contrary to the 14th Amendment to the Constitution of the United States.

The trial judge refused to give said instruction, and, on the contrary, charged the jury that the injury

to the plaintiff-in-error was *damnum sine injuria,* if there was no negligence on the part of the defendant-in-error.

The jury rendered a verdict in favor of the plaintiff-in-error in the sum of $25,000.

Subsequently, on motion of defendant-in-error, the court of common pleas of Allegheny County, Pennsylvania, set aside the verdict in favor of the plaintiff-in-error, and entered judgment *non obstante veredicto* in favor of the defendant-in-error, holding that there was not sufficient evidence of negligence on the part of the defendant-in-error to sustain a recovery, and that by virtue of the provisions of said Act of June 7th, 1895, P. L. 135, the injury to the plaintiff-in-error, caused by the removal of the wall of his theatre and the location of a party wall on his property was *damnum sine injuria*, in the absence of proof of negligence.

On appeal to the Supreme Court of Pennsylvania, the plaintiff-in-error assigned, as error in the judgment of the court below, the refusal of the trial judge to give the instruction above cited, and said assignment of error was overruled by the Supreme Court of Pennsylvania, which affirmed the judgment of the lower court and entered judgment in favor of the defendant-in-error.

The opinion of the Supreme Court of Pennsylvania is reported in 263 Pa. 158.

Specification of Errors.

FIRST. The Supreme Court of the State of Pennsylvania erred in holding that an act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said court, was constitutional and did not violate the Fourteenth Amendment to the constitution of the United States.

SECOND. The Supreme Court of the State of Pennsylvania erred in not holding that an Act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said court, deprived the plaintiff in error of his property without due process of law and was in violation of the Fourteenth Amendment to the constitution of the United States.

THIRD. The Supreme Court of the State of Pennsylvania erred in not holding that an act of the General Assembly of said state entitled, "An Act regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class," approved the 7th day of June, 1895, as construed by said

court, denied to the plaintiff in error the equal protection of the laws and was in violation of the Fourteenth Amendment to the constitution of the United States.

FOURTH. The Supreme Court of the State of Pennsylvania erred in not sustaining the Eighth assignment of error filed by this plaintiff in error as appellant in said court, which assignment of error was as follows:

> "The learned trial judge erred in refusing plaintiff's third request to charge the jury, which request was as follows:
>
> 'THIRD. The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States.
>
> 'Refused.'
>
> "To which charge of the Court and to the refusal of the Court to affirm all of plaintiff's points, counsel for plaintiff except. Exception allowed and bill sealed." (Rec. 108)

FIFTH. The Supreme Court of the State of Pennsylvania erred in entering final judgment as follows:

> "Jan. 4, 1919, The assignments of error are overruled and the judgment is affirmed.
>
> (Rec. 123.) MOSCHZISKER, *J.*"

The judgment of the trial court so affirmed was as follows:

"And now, September 15, 1917, the motion for judgment *n. o. v.* is granted and judgment for plaintiff is hereby reversed, and judgment directed to be entered in favor of the defendant. *Eo die*, exception allowed to plaintiff.

BY THE COURT.

"*Eo die*, exception *ex parte* plaintiff is allowed and bill sealed.

JOSIAH COHEN, [SEAL]
Trial Judge."

(Rec. 131)

Argument.

I.

The plaintiff-in-error, Jackman, had owned, since 1889, a tract of land in Pittsburgh. Since 1890, there had been a large theatre on this tract and the wall was erected entirely within the boundary line (Rec. 54, 23).

Some time prior to 1914, the defendant-in-error, the Rosenbaum Company, purchased the adjoining tract and razed the buildings thereon in preparation to erect a large twelve-story department store. The company then proceeded to erect a party wall on the line between this property and Jackman's, and in doing so committed the following acts, which Jackman avers, were acts of trespass:

(1) It entered upon his property and tore down the entire east wall of his theatre throughout its full length of 112 feet (Rec. 4, 10);

(2) It erected a new division or party wall twelve stories high, having foundation piers fifteen feet thick, one-half, or seven and one-half feet, of which was located permanently over the line and on Jackman's lot, and extending downward 33 feet below the curb; and on these foundations it erected a frame of structural steel which carried a thirteen-inch brick wall, one-half of which projected over the dividing line and upon Jackman's property;

(3) In tearing down the old wall and erecting the new wall, the Rosenbaum Company tore out

the plumbing and the heating system of the theatre and destroyed the decorations on that side of the building, tore out the fire extinguishing system, the marble work of the lobby and of the entrance to the gallery, broke the floor of the stage of the theatre and broke through the roof and damaged Jackman's building in other respects so that he was compelled to expend over $18,000 in repairing and restoring his theatre, and lost, in addition, $11,500 through inability to rent the theatre during the period for which it was rendered untenantable (Rec. 28-31, 35, 42, 55, 64-66).

Jackman brought an action in trespass averring, *inter alia*, that:

> "The defendant * * * entered upon the plaintiff's premises and commenced the removal of the east wall of the said Duquesne Theatre buildings, and from the beginning of said work rendered the said building wholly unfit * * * "
>
> —and—
>
> "proceeded to erect a party wall upon its said premises and upon the plaintiff's premises". (Rec. 4-5).

At the trial, the plaintiff-in-error proved the facts above recited.

The defendant-in-error sought to justify its acts under section 9 of the Pennsylvania Party Wall Act of June 7, 1895, P. L. 135.

In reply to this defense, the plaintiff-in-error requested the trial court to charge as follows:

> "The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States." (Fourth Assignment of Error.)

The trial judge refused this instruction.

A verdict in favor of the plaintiff-in-error in the sum of $25,000 was later set aside and this decision was affirmed by the Supreme Court of Pennsylvania. Both these courts held that there was no evidence of negligence and the plaintiff's loss was *damnum absque injuria.*

The Supreme Court of Pennsylvania construed the Act as authorizing the defendant-in-error to commit all the acts complained of and without the necessity of making any compensation to the plaintiff-in-error, holding that the act so construed was a valid exercise of the police power of the state and a complete defense to the plaintiff's action of trespass.

The plaintiff's right to recover depends, therefore, on whether the Party Wall Act, as construed by the Supreme Court of the state, is in violation of the Fourteenth Amendment of the Federal Constitution.

If it is unconstitutional, then the statute and all proceedings under it were a nullity and every act of the defendant,—the entry upon the plaintiff's property, tearing down his wall and damaging the remainder of his building,—was a trespass at common law, and all damages resulting from any of these acts may be recovered.

All these acts were done under claim of authority conferred by the Party Wall Act, and if that statute as applied in the court below in this case contravenes the Fourteenth Amendment, then all these acts of the defendant-in-error were actionable.

The statute in question provides, in substance, as follows (Acts of June 7, 1895, P. L. 135, printed in appendix to this Brief):

(Section 1). That in cities of the second class there shall be created a bureau of building inspection attached to the department of public safety and under the supervision and control of the director of said department.

(Section 9). That anyone about to erect a party wall shall apply to said Bureau, describing his property and furnishing plans and specifications of the party wall he desires to erect. Said Bureau then fixes a time for a meeting on the ground, notice of which shall be served on the adjoining owner. At the time appointed, the Superintendent of the Bureau, "or some suitable person by him appointed," shall have the line between the two parties surveyed and also "the land upon which

the said party wall is to be erected, with the breadth and length of the same, and which wall shall be equally one-half upon the land of each of the adjoining owners, unless the adjoining owners shall object that said wall as proposed is thicker than necessary for the purpose of any ordinary building. If such objection shall be made, then the said Superintendent, or the person by him appointed, shall determine how much of said wall shall be placed upon each of said lots and shall decide the same within forty-eight hours after the said objection has been made, and his decision shall be final and conclusive upon all parties."

The party first applying shall erect the wall at his own cost, which cost and the proportions to be paid by each owner, shall be determined by the Superintendent, or his agent; the adjoining owner shall not thereafter use the said wall for any new structure until he has paid his proper proportion, as fixed.

The question of necessary alterations and repairs in existing walls shall also be referred to and determined by the Superintendent and he may order an *old party wall* torn down and a new one erected and fix the proportion of the cost which each of the adjoining owners shall pay.

The courts are given power to restrain the adjoining owner from making any new use of said wall until his proportion of the costs, as fixed by the Superintendent, has been paid.

The above is, in substance, the whole of the statute.

Except in the minor instance of restraining the adjoining owner from using the wall until he has paid his proportion of the costs, the courts are without all authority.

They may not determine whether the wall is necessary or not. Indeed, the Superintendent of the Bureau may not do that. The discretion rests entirely in the owner desiring to build.

Whether or not he will invade his neighbor's property and tear out the side of his house is to be determined by his own wish. His will in the matter is omnipotent.

The owner is authorized by the statute to occupy a substantial strip of the private land of his neighbor permanently,—during the life of his building, at least, —fifty or a hundred years, as the case may be.

If he possessed the power of eminent domain, he could appropriate no more extensively and no more permanently.

But his power rises higher than the right of eminent domain,—higher than the right of the sovereign state. He can actually take this property, the court below ruled, without paying any compensation whatsoever.

Further, this occupation is not by the public or for the benefit of the public.

It is the owner who desires to build who occupies this strip, and he does so solely for the purpose of his own building.

The owner whose land is taken may at some time be compelled by the situation in which he is placed by this wall to use some portion of it, but, except for this, no one else is intended to use it or can use it.

Therefore, what the owner who builds does, is not an exercise of the police power. It is an actual appropriation and it is wholly in the interest of a private person and not for the benefit of the public.

Statutes which prescribe the thickness and character of materials for party walls erected voluntarily by agreement of the parties have been upheld as valid examples of the police power. But this statute contains nothing of that sort. It does not require a party wall to be different in any respect from any other sort of wall.

All that the Act of 1895 does, is to provide for an official survey of the dividing line between the two properties, and to authorize one owner to construct his wall partly upon the land of another.

There is no requirement as to the thickness or strength of the materials to be used; as that the wall be thirteen or more inches thick or be of brick or stone or cement or other fire-proof materials.

For anything that appears in this enactment, the walls may be thin and unsubstantial, or of wood or even more inflammable material.

On the questions as to the thickness and strength of the wall, and whether it shall be of non-combustible materials, this legislation is wholly silent.

This section is a re-enactment of the Act of April 8, 1872, P. L. 986, which is an act regulating party walls in the city of Pittsburgh, but which likewise made no provision whatever as to the matter of strength or materials or safety of the wall.

Other legislation regulates the character of walls of buildings generally in the city of Pittsburgh. But the absence of any such requirement in the party wall statutes is a demonstration that such statutes were not passed to provide for security in the construction of buildings or to promote the public safety. A party wall is required to be built no differently from any other outside wall of a building.

As these statutes contain no provision in the interest of public safety or health, they cannot be classed as police legislation.

Their sole purpose, as we have said, is to enable one owner to build part of his wall on the land of his neighbor.

When an owner decides that it is to his own private interest to do this, no one—neither his neighbor nor the superintendent of the Bureau of Building Inspection nor the courts—can halt him.

It makes no difference whether a party wall at this particular location is advantageous or economical. This

is decided by the owner who wishes to build and upon his own selfish interest. He can erect just such a building and just such a wall as he chooses. It may be a wall specially designed for the kind of building he wishes to erect and suitable for nothing else.

If the lower court's construction is correct, then the building of a party wall and its dimensions and character are determined by the self-interest and convenience of the owner who first wishes to build one. Whether such owner chooses to erect a department store or a railroad terminal, a cathedral or a blast furnace, he can do so at any time—years after he might or should have improved his property—tear down the wall of the finest building in the city and erect in its stead a wall to his own liking. Under this law, as interpreted below, no one can stop him, not even the Bureau of Building Inspection. The owner who built his wall on his own property cannot prevent this or recover damages for the wreck of his own building.

Indeed, one has but to look at the facts of this case to see that this party wall legislation is utterly unsuited and not intended for such so-called walls as are today a part of the modern steel sky-scraper. Such buildings are specially designed and differ widely in construction and in use from other buildings and from each other. These party wall statutes were passed at an early date with reference to buildings three or four stories in height, dwellings especially, and more or less similar in construction.

The case at bar affords an extreme illustration. The Rosenbaum Company crossed the dividing line and erected foundations extending 7-1/2 feet over on the property of Jackman, tearing out the latter's wall and whatever else interfered with the erection of the new wall which the company desired for a twelve-story department store. On this foundation was erected a steel frame-work, and on this skeleton of steel was hung a brick wall only thirteen inches thick. This shallow brick wall, not able to support its own weight, is now the only dividing wall between a large department store and this theatre.

Under the construction placed by the Supreme Court of Pennsylvania on this section 9 of the Act of 1895, the Rosenbaum Company can do all this and Jackman has no redress whatever,—either to prevent the occupation of his land and the removal of his wall or to recover damages.

It is difficult to believe that any of the party wall statutes in Pennsylvania ever contemplated or was intended to authorize what was done in this case. But the Supreme Court held that they did.

In testing the constitutionality of this provision of the Act of 1895, the case stands just as if the legislature of the state had itself declared that the Rosenbaum Company might erect foundations 7-1/2 feet on Jackman's property, tear down Jackman's wall and wreck his theatre in the manner already described.

A statute so providing would amount to an unreasonable exercise of the police power.

We are not here dealing with the party wall statute in its original application to buildings three or four stories high such as are similar in design and can be built with a party wall without hardship to either owner. For the sake of argument, let it be granted that such an application of the statute might be upheld as an exercise of the police power or as sanctioned in some way by long observance which gave rise to what the Court below says is a settled rule of property. All this would not justify the application to such a case as this. The record here presents another to make an arbitrary and unreasonable exercise of the police power.

We submit, therefore, that the State Court erred in holding that the defendant-in-error had legal justification for the acts of trespass committed on the property of the plaintiff-in-error and was not liable to pay damages. For—

(1) Neither under the common law nor under any of the English statutes did a land owner have any right to erect a party wall partly upon the land of another without the latter's consent;

(2) The Pennsylvania Party Wall Act of June 7, 1895, P. L. 135, section 9, is not a valid exercise of the police power; because—

(a) The statute attempts to authorize the *appropriation* of private property and without making compensation to the owner;

(b) This statute attempts to authorize the appropriation and use of property for the

benefit of *a private person*, the adjoining owner, whereas the police power may be exercised only for the benefit of the *community at large*;

(c) The statute attempts to impose a regulation of private property which cannot be upheld as being in the interest of public safety, health, morals or convenience;

(d) Aside from these objections, the application made of the statute in the case at bar amounts to an arbitrary and unreasonable exercise of the police power.

II.

THE DECLARATION OF THE SUPREME COURT OF PENNSYLVANIA THAT THE PARTY WALL STATUTE IS A VALID EXERCISE OF THE POLICE POWER DOES NOT LESSEN THE POWER OR DUTY OF THIS COURT TO DETERMINE FOR ITSELF WHETHER SUCH STATUTE AS INTERPRETED BY THE STATE COURT IS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In the opinion of the Supreme Court of Pennsylvania, it is said:

> "It has been decided repeatedly that the 14th Amendment to the federal constitution does not limit the police power of the states." (Rec. 115).

Nevertheless, the Fourteenth Amendment is the supreme law of the land, and in order to enforce it this court must decide for itself what is the scope of the police power of the state and whether the particular

enactment as construed and applied in the state court properly falls within what this court determines to be the limits of that power.

All this has been repeatedly said by this court, but in view of the insistence of the court below upon the police power of the state, we cite the following decisions:

Dobbins vs. Los Angeles, 195 U. S. 223:

In this case, a city ordinance adopted in August defined the portions of the city within which gas works might be erected. Plaintiff secured a permit and in September began to construct a gas plant within its limits. In November, the ordinance was amended so as to make it unlawful to build at the location where the plaintiff had begun.

In holding that the second ordinance was in violation of the Fourteenth Amendment, this court, by Mr. Justice Day, said:

> "* * * It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton v. Steele*, 152 U. S. 133, 137,

Mr. Justice Brown, speaking for the court, said upon this subject:

" 'To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' (236) * * *

"And in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, Mr. Justice Harlan, delivering the opinion of the court, said; '* * * as the Constitution of the United States is the Supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police power, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived.' (236-237)

"But the exercise of the police power is subject to judicial review and property rights cannot

be wrongfully destroyed by arbitrary enactment." (239)

Buchanan vs. Warley, 245 U. S. 60, 74:

"But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

"The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

Coppage vs. Kansas, 236 U. S. 1, 15-16:

"* * * * when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation

and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. *St. Louis S. W. Ry. v. Arkansas,* 235 U. S. 350, 362, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power."

Lochner vs. New York, 198 U. S. 45, 56:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State,

or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

See to the same effect:

Lake Shore &c. Ry. Co. vs. Smith, 173 U. S. 684, 689.

III.

THE PARTY WALL ACT DEPRIVES AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE IT GRANTS HIM NO OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER HIS PROPERTY SHALL BE OCCUPIED AND NO COMPENSATION FOR PROPERTY ACTUALLY TAKEN.

The procedure is described from the following excerpts from the statute:

"Any person or persons who may be now erecting or may desire hereafter to erect any house or building in such cities, and who may desire to erect therewith a party wall to be used in common by the person or persons erecting, and the owner or owners of the adjoining lot may apply to the said Bureau of Building Inspection of such cities signifying his or their intention to erect a party wall, and describing the location of his or their lot and the lot adjoining, partly upon which said party wall is to be erected, with the plans and specifications of the said proposed wall and the materials of which the same is to be built, whereupon it shall

be the duty of the said Bureau of Building Inspecton to appoint a time at which the Superintendent thereof, or some person by him authorized, will meet the party or parties upon the premises, not more than five days thereafter, of which application a copy, with notice of the time so appointed, shall be served by the said Bureau of Building Inspection upon the occupant of said lot at least three days before the time so fixed. * * *

"At the time appointed, the Superintendent of the said bureau, or some suitable person by him appointed, shall have the line dividing said lot properly surveyed by the bureau of engineering and surveys of such city, and the land upon which the said party wall is to be erected, with the breadth and length of the same, and which wall shall be equally one-half upon the land of each of the adjoining owners, unless the adjoining owners shall object that said wall as proposed is thicker than necessary for the purpose of any ordinary building. If such objection shall be made, then the said Superintendent, or the person by him appointed, shall determine how much of said wall shall be placed upon each of said lots and shall decide the same within forty-eight hours after the said objection has been made, and his decision shall be final and conclusive upon all parties." (Sec. 9.)

From these provisions, two things appear conclusively:

(1) The right given to an owner to occupy a portion of his neighbor's land is absolute. The decision rests entirely with him. It matters not how unsuitable

or how ruinous the party wall which his selfish interest proposes, may be to the adjoining owner, or how strong and just may be the latter's protest. If the first owner elects to build a party wall, the requirement of the statute is satisfied. He can do it. There is no hearing on this question and no official or tribuanl or court may hear or determine what is fair and just.

If the adjoining owner objects that the proposed wall is "thicker than necessary for the purpose of any ordinary building," then the superintendent determines "how much of said wall shall be placed upon each of said lots." This is left entirely to his discretion. The Act does not direct him to determine what would be one-half the thickness of a wall necessary for any ordinary building. He can allow any portion up to one-half of the party wall to be placed upon the adjoining lot. What is "any ordinary building," and how much of the wall he shall allow to be put over the line, the statute prescribes no rule or standard to be applied by him in fixing the rights of the parties.

The Act expressly declares that—

> "His decision shall be final and conclusive upon all parties."

The legislature has declared that the owner has the absolute right to build half of his wall on his neighbor's lot,—half of a wall necessary for any ordinary building in any event, and more if the superintendent allows.

(2) There is plainly a permanent occupation and appropriation of a substantial portion of the adjoining

owner's land. For this, the Act provides no compensation.

In England, where there are no constitutional restrictions upon legislation, the courts have held under some of the statutes cited hereafter that the right of one owner to occupy his neighbor's land did not take away the latter's right to recover damages therefor.

But the court below construed this Act differently, and held that it takes away entirely the right of the adjoining owner to recover compensation.

This court has frequently held that due process of law in the Fourteenth Amendment requires that compensation be made for property *taken* and that a hearing be provided before a proper tribunal to fix the amount of such compensation.

In *Chicago, etc., Railroad vs. Chicago,* 166 U. S., 226, in speaking of a taking of property *for public use* (a much more meritorious case than here, where the taking is wholly for private use), this Court said that compensation *must be provided for* any property taken.

The Court said (241):

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and

authority, wanting in the due process of law required by the *Fourteenth Amendment of the Constitution* of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

The Court further said (235):

"Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation' (p. 228). The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' *2 Story Const.*, Sec. 1790; *1 Bl. Com.*, 138, 139; *Cooley's Const. Lim.*, 559; *People vs. Platt*, 17 Johns., 195, 215; *Bradshaw vs. Rodgers*, 20 Johns., 103, 106; *Petition of Mt. Washington Road Co.*, 35 N. H., 134, 142; *Parham vs. The Justices, &c.*, 9 Georgia, 341, 348; *Martin, et al., ex parte*, 13 Arkansas, 198, 206 *et seq.; Johnston vs. Rankin*, 70 N. C., 550, 555."

And in holding that there must be a real hearing and a real inquiry and an allowance of damages, and not a mere form of hearing, the court said (236):

> "The Legislature may prescribe a form of procedure to be observed in the taking of private property for public use, *but it is not due process of law if provision be not made for compensation.* Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation *would be a mockery of justice. Due process of law,* as applied to judicial proceedings instituted for the taking of private property for public use, *means,* therefore, *such process as recognizes the right of the owner to be compensated if his property* be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (Italics are ours.)

McCoy vs. Union Elevated R. R. Co., 247 U. S. 354, 363:

In this case Mr. Justice McReynolds said:

> "We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result

was to deprive him of property without such compensation then due process of law was denied him, contrary to Fourteenth Amendment."

To the same effect are:

Backus vs. Fort Street Union Depot, 169 U. S. 557, 565;

Fayerweather vs. Ritch, 195 U. S. 276-279, 298.
Sweet vs. Rechel, 159 U. S. 380.

Private property cannot be taken at all for private use under any form of law. If it is so taken, it is not due process of law.

In *Missouri Pacific Railway vs. Nebraska*, 164 U. S., 403, the Court said (417):

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson vs. Leland*, 2 Pet., 627, 658; *Murray vs. Hoboken Co.*, 18 How., 272, 276; *Loan Association vs. Topeka*, 20 Wall., 655; *Davidson vs. New Orleans*, 96 U. S., 97, 102; *Cole vs. La Grange*, 113 U. S., 1; *Fallbrook District vs. Bradley, ante* (164 U. S.), 112, 158, 161; *State vs. Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 402."

Under these authorities, the Legislature of Pennsylvania could not authorize any corporation or indi-

vidual,—not a railroad, although built to serve the public,—not the city itself for the use of the inhabitants of the city,—not even the State itself for the use of the State,—*to take my property without full compensation to me.*

Such a proceeding would be wholly void,—would not be *due process of law* under the United States Constitution. The above cited cases, and many others, have ruled that principle over and over again.

Is it now due process of law to permit a *private corporation*, acting for itself *and not for the public*, acting for mere private uses and *for its own profit*, to come upon my property, without my consent, and to destroy it to the extent of $25,000 *without any provision for compensation to me?*

IV.

THE POLICE POWER DOES NOT AUTHORIZE THE TAKING OR APPROPRIATION OF PRIVATE PROPERTY WITHOUT MAKING COMPENSATION TO THE OWNER.

The court below permitted a private party, the defendant in error, to do what even a sovereign, in the exercise of the power of eminent domain, could not do —take private property without making compensation therefor. This could be done, it said, because the taking was an act of the police power.

But the constitutional requirement that compensation be made for private property *taken* is general. Whenever property is taken, the right to com-

pensation necessarily follows. It matters not whether this taking be under the power of eminent domain, or under the police power, or under any other power. It is the result of the taking of property and not the source of the power that determines the right of the owner to compensation. The Fifth Amendment to the Federal Constitution provides:

> "nor shall private property be taken for public use without just compensation."

This requirement is not restricted to a taking by eminent domain. It is general and applies to the taking of property under any source of legislative power.

While the Fifth Amendment is a limitation upon the action of the Federal government only, this court has held in the cases cited, supra (p. 27), that the Fourteenth Amendment imposes the same requirement of compensation where property is taken pursuant to authority conferred by the States, and that nothing is gained by calling a taking of private property an exercise of police power.

Under the Act of 1895, as construed by the court below, the right of an owner who is to build to take a portion of his neighbor's property, as we have seen, is absolute.

No question of necessity for the taking, or of the suitability of the proposed party wall, or of the economy to be gained by its construction, or of the relative benefit to the owner who builds and the detriment to his neighbor, can be raised.

This power is just as absolute as the power of eminent domain. Again, the taking is at least for the life of the building which the first owner wishes to build. It may be fifty or a hundred years, and then the party wall can be rebuilt or replaced, and even a wider foun dation wall constructed.

The taking is of a substantial portion of the adjoining property. Here the foundation is projected 7½ feet over on the plaintiff-in-error's land—it extends throughout the entire length of his lot, 112 feet,--and downward 33 feet below the curb.

If the statute authorizes this, it equally authorizes the occupation of a larger strip—a quarter or half of the adjoining lot. Party walls can be built on both sides of the lot and have an equal width—until the use of the lot is seriously interfered with, if not entirely prevented.

Indeed, in the older portions of large cities, and so in Pittsburgh, lots are frequently no more than fifteen or twenty feet wide. Under the decisions of the court below, the owners on each side of a lot could construct foundations such as were used in this case and practically destroy the value of the lot.

In *Sweet vs. Rechel*, 159 U. S., 380, 398, this court had before it an Act of the Legislature of Massachusetts, which authorized the City of Boston to occupy, drain and fill certain low-lands of private owners, for the preservation of the public health.

This court held that the statute might be upheld, but only upon the condition that reasonable compensation was made to the owners.

In the opinion of the Court, Mr. Justice Harlan said:

> "This necessarily follows from the restriction imposed by the constitution to the effect that statutes passed in the exercise of the police power of the Commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is, that the owner of private property, appropriated to public uses, shall receive a reasonable compensation therefor."

In *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S. 510, 523, this court, in holding that the order of a State Commission requiring the railroad company to build a connection to the line of another railroad, was in violation of the Fourteenth Amendment, said (523):

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it *was a taking of property*, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid."

In *Missouri Pacific Ry. vs. Nebraska*, 217 U .S. 196, a statute which required a railroad company to put in switches at its own expense, on the application of the owner of a grain elevator, was held to be a taking

of its property and in violation of the Fourteenth Amendment, and not justified by the police power.

Mr. Justice Holmes said (p. 205-206):

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be $450 in one and $1,732 in the other; and to require the company to incur this expense *unquestionably does take its property*, whatever may be the speculations as to the ultimate return for the outlay. *Woodward vs. Central Vermont Railway Co.*, 180 Massachusetts, 599, 602,603. Moreover a *part of the company's roadbed is appropriated mainly to a special use*, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator."

Louisville and Nashville Railroad Company vs. Central Stock Yards Company, 212 U. S. 132:

The constitution of the State of Kentucky, as construed by the court below, required a carrier to deliver its cars to connecting carriers, without providing adequately for their return or compensation for their use, and further required it to accept cars, near its terminus, of competing companies who wished to use its terminal station.

This court held that both features of the constitution amounted to a taking of property without com-

pensation, and were in violation of the Fourteenth Amendment.

In *Northern Pacific Ry. vs. North Dakota,* 236 U. S. 585, 598, in holding that a statute fixing an interstate rate for the transportation of coal was in violation of the Fourteenth Amendment, this court said (598):

> "The State insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to *an appropriation of the property* to public uses upon terms to which the carrier had in no way agreed."

In two well-reasoned decisions this principle has been applied to party wall statutes, and the latter declared unconstitutional.

In *Wilkins vs. Jewett*, 139 Mass. 29, the Supreme Judicial Court held that the provincial statute providing that anyone building in Boston might set half his partition wall on his neighbor's land, was not in force in the commonwealth of Massachusetts because such statute would be unconstitutional.

Chief Justice Morton said:

"We are of opinion that this provision of the Provincial Statutes was never in force in the Commonwealth of Massachusetts. The Constitution continued in force all laws adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, until altered or repealed by the Legislature, 'such parts only excepted as are repugnant to the rights and liberties contained in this Constitution.' Const. Mass. c. 6, art. 6.

"The provision in question undertakes to deal with private property, and to authorize one man to appropriate and use the property of another without his consent. It assumes to take private property without due process of law, and without compensation. It is repugnant to the fundamental principles declared in the Declaration of Rights, that the property of the subject shall not be appropriated, even for public use, without paying him a reasonable compensation therefor, and that he

shall not be deprived of his property but by the judgment of his peers, or the law of the land; and that, in all controversies concerning property, he shall have a right to trial by jury. Declaration of Rights, arts. 10, 12, 15. *Morse vs. Stocker*, 1 Allen, 150. *Forster vs. Forster*, 129 Mass. 559.

"Undoubtedly, the authority of the Legislature, in the exercise of the police power, is very broad. This power is founded upon the principle that any man may be reasonably restrained in the use of his property so as not to injure others. *Watertown vs. Mayo*, 109 Mass. 315, 318. But it does not justify authorizing one man to appropriate and use the property of another without his consent and without adequate compensation."

In *Traute vs. White*, 46 N. J. Eq. 437, Vice Chancellor Pitney said:

"And, I think it proper to say further, that, but for the express dictum of Chancellor Green in *Hunt vs. Ambruster*, 2 C. E. Gr. 208, I should have thought an act or ordinance authorizing a party to build a wall on his neighbor's land to be simply not legislation, but usurpation. I confess it is not forbidden by any clause in the constitution, and I have always supposed it was not thought to be necessary by the framers of that instrument to insert in it a clause forbidding the taking of private property for private use, either with or without compensation, and that legislation in that direction was, in the absence of express constitutional authority, beyond the law-making power. And it seems to me that

where my neighbor takes exclusive possession and occupation of my land by covering it with a solid wall of masonry, many feet high, he 'takes' it from me in the most thorough and effective manner, although the legal title remains in me. I do not understand that the legal title is at all involved in an unlawful 'taking' of land, but that it is a question rather of practical dominion over, and the right to use it at the owner's free will and pleasure, so that he do not injure his neighbor or the public. When and so far as the owner is prevented from exercising such dominion over his land, it is 'taken' from him. Nor do I understand such taking can be authorized by any supposed benefit to result to the owner. Especially is this true, in the case of a party wall, where the realization of the supposed benefit depends entirely upon the manner in which the owner to be benefited may desire to enjoy his lot. If he shall never desire to build on that part of his lot, a party wall will never be of any benefit to him; or even if he shall desire to build up to his line, the party wall may be entirely unsuited in thickness and material for the structure he proposes to erect, and so be a positive injury rather than a benefit to him.

"There is a clear distinction and no necessary connection between legislative regulation of the size and character of the walls of buildings in crowded cities, and legislative authority to one man to build a wall on his neighbor's land with the view of conferring a benefit upon him. The former is justifiable and proper as a police regulation, to prevent the spread of fire, and to guard against the danger

of falling buildings, and that, I understand, the history of the legislation in regard to party walls shows to be its origin.

"But the question whether or not two adjoining owners shall erect and own and enjoy a wall in common between them or shall each erect his own wall on his own land and enjoy it as he does his other property, concerns those adjoining owners only, and in it the public has no interest whatever. (440-441). * * *

"This reasoning seems to me to include party walls and in effect to overrule *Hunt vs. Ambruster.*" (444.)

In *Schmidt vs. Lewis*, 63 N. J. Eq. 565, Vice Chancellor Reed, in speaking of the party wall ordinance, said (566):

"* * * assuming that the right to impose a portion of a building upon the land of another is authorized by legislation, I yet entirely concur in the views expressed by Vice Chancellor Pitney in respect to the constitutional invalidity of such legislation. *Traute vs. White*, 1 Dick. Ch. Rep. 437."

Brooklyn Park Commissioners vs. Armstrong, 45 N. Y., 234, 244:

"Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. * * *

"When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner."

In *Philadelphia vs. Scott*, 81 Pa., 80, 86, the defendant was ordered under the provisions of the Act of March 25, 1848, P. L. 250, to repair the bank of the Delaware River along his property so as to make it safe. Not having complied therewith, the Commissioners did the work and filed a lien against the property, to compel the owner to pay the costs thereof also in accordance with the Act.

Held, that the owner was not liable to pay.

The Court said (86):

"By no contract relation can she (the State) impose on him the burthen of the public duty of banking out the stream for public purposes. *It is no exercise of the police power of the state on the ground of his fault, whereby the expense can be laid upon him.* Nor can the private interests of other owners of like lands be made a ground of banking at his expense. They bought their lands in like condition, subject to the natural flux and reflux of the waters. If after arising, circumstances make their lands better adapted to new

purposes by reason of changes in business and population, certainly no duty upon their neighbor arises out of these circumstances to benefit them at his expense: *Rutherford's Case,* 22 P. F. Smith, 82. The interests of the state may make it a public affair, and cause her to exercise her powers for the public good, but this imposes no duty on the owner to pay the expense. He has done nothing to require him to shut out nature, acting in obedience to her own well-known general laws, subject to which all these owners of marsh lands bought. It would be an abuse of terms to call this an exercise of the Police Power of the state, in the sense of enforcing a remedy against the owner for a nuisance or a public injury. (Italics are ours.)

* * *

"The reason why a private building may be demolished to prevent the spread of fire is, *that it is called for by the immediate necessity of the case.* It must be done on the instant, and because of an actual necessity. *But could the state, in a time of security, when no fire is present, pull down buildings without compensation at certain points where it might be supposed the public interest would be served if a fire should happen? No one would concede this monstrous proposition.* The state may open or widen streets, and do many things for public convenience and security, but in doing so she exercises her power of eminent domain, and allows just compensation either in benefits or money, or both, according to the circumstances." (87) (Italics are ours.)

That case, therefore, was held to be beyond the operation of the doctrine of *sic utere tuo ut alienum non laedas.*

As the Court said (86):

> "It is no exercise of the police power of the state *on the ground of his fault,* whereby the expense can be laid upon him."

Herein lies the true distinction.

Whenever a situation arises under the operation of the police power and the case is decided under the doctrine of *sic utere tuo ut alienum non laedas,* no compensation is decreed.

But that legal maxim marks the boundary of the unmixed operation of the police power. Whenever that line is passed and that legal principle no longer controls, the rule of no compensation no longer holds.

Other cases might be cited holding to the rule of no compensation, but in every case, we submit, the controversy is ruled by the maxim that one must use his property so as not to injure his neighbor.

In every case, the owner's use of his property was restricted in order to protect his neighbor or the public from danger; or he was compelled to make changes or improvements to protect his employes or the public from danger; or his property was destroyed as a nuisance, dangerous to his neighbors or to the public.

In *In the Matter of Cheesebrough,* 78 N. Y., 232, we find a very suggestive case. A statute of New York provided that

> "whenever it shall appear to be necessary for the protection of the public health"

that any swamps should be drained within the limits of the city of New York, then that should be done by the construction of blind drains to some natural water-course. A pond or swamp not owned by the petitioner was so drained through the lands of the petitioner and a blind drain constructed over his property, and it was sought to make him pay part of the assessment. The petitioner claimed that no provision having been made for compensation for coming upon his lands and constructing the drain, the city officials were trespassers. The city replied that it did these things under the police power and no compensation was necessary.

The court said (236):

> "The interference with property under the police power may be justified in most cases by the application of the principle that one shall so use his own property as not to injure or endanger the property or health, or disturb unnecessarily the peace and comfort of his neighbor. *But there never can be any necessity under the police power or the law of necessity to permanently appropriate land to the public use without compensation.* It may temporarily be interfered with or appropriated; necessity may justify so much, but when the necessity passes away, the right ceases. To illustrate: A pond of stag-

nant water may endanger the health of the neighborhood, and the public may cause it to be drained at once, and for that purpose may dig the necessary drains and the land may be interfered with for that purpose, under the police power, without compensation. But here there was no great emergency; no pestilence; no actual necessity. This was a work carried on under a general law applicable to the city, looking to the future health and welfare of the city. It was a work not so much necessary for the lands of the petitioner as for other lands requiring drainage through his. *It is believed that no case can be found justifying the permanent appropriation of land without compensation under such circumstances.*" (Italics are ours.)

Vreeland vs. Forest Park Reservation Commission, 82 N. J. Eq., 349, is another case illustrating the same principle.

Under an Act of Assembly in New Jersey, entitled "An Act for the Protection of Woodlands," it was provided that wherever there is woodland along a railroad, there shall be constructed a fire line not less than ten feet wide, on which all of the trees, brush, grass and turf should be removed, exposing the bare earth.

The Erie Railroad Company undertook to enter upon complainant's land and to establish this fire line through his woodland. Held, that this could not be done without compensation to the complainant.

The Court said:

"There is nothing in the nature of the land, *or its use, that creates a nuisance to be abated.* The sole purpose of the statute is to protect the public from a non-existant, but possible condition, if sparks of fire should be thrown from the engines of the defendant railroad company, running over land adjacent to that of the complainant, and for that purpose authorizes the appropriation of private lands lying adjacent to railroads for the purpose of preventing the spread of fires, caused by the railroad company, *for the benefit of property other than that of the owner of the land taken.*"

After quoting from *In the Matter of Cheesebrough, supra,* the court said:

"In the case under consideration, nothing appears which justifies the appropriation of the complainant's land under the police power. The contemplated action is not a regulation of the use by the complainant of his property, *nor does any condition exist which may be interpreted to create an emergency which would warrant the taking of private property for use or destruction, for the general good without compensation.* All that appears is, that in order to establish a fire line on each side of all of the railroads of the state, the adjacent land may be taken without compensation, and being an actual permanent appropriation for the protection of the public against the possible spread of fire, the complainant is entitled to compensation." (Italics are ours.)

McKeon vs. Railroad Co., 75 Conn., 343:

Under an order by the proper state officials, a railroad was compelled to abolish a grade crossing, and in order to do that work it was authorized to place its tracks temporarily on the street in front of the complainant's property; it did this, thus shutting off access to his property, on which he operated a livery stable. An action in trespass was brought against the railroad for the damages sustained by the complainant, and defense was made that under the action of the state under its police power, the railroad was compelled to act in the way in which it did, and that the complainant was entitled to no compensation. The statute in that case provided that defendant should have "the free use of said streets or portions of streets and the rights to temporarily close such streets as may be necessary for the convenient prosecution of the work."

In holding that plaintiff was entitled to substantial damages, the Court said (346):

> "Whatever authority the General Assembly could give for the temporary occupation of Railroad Avenue for railroad purposes has been given. *That authority is ample to protect the defendant against any charge of the commission of a public wrong. No statute, however, can avail to justify the taking of private property for public use without just compensation. Constitution of Conn.*, art. 1, par. 11 * * *. That it put it there merely as a temporary expedient in aid of a lawful work, and removed it as soon as the work was completed, is only

important in determining the amount of compensation to which he is entitled. A lawful work cannot justify an unlawful expedient; and any expedient is unlawful as respects one whose property is thereby taken without his consent, unless he is first paid for what he is to lose. Nor is a wrongful taking of property, whether it be real or personal, any the less a taking because it is not permanently appropriated to the wrongdoer's use.

"It is contended by the defendant that all its acts were done at the command of the State; that this command was an exercise of the police power; and that for damage due to an exercise of that power no compensation can be recovered unless by force of some express statutory provision. * * *.

"The legislation on which the defendant relies in the case at bar makes no direct provision for compensation for property taken. The Constitution does; and that is enough." (Italics are ours.)

And the court held that the plaintiff was entitled to damages although the railroad in entering upon the streets and obstructing the plaintiff's property, was doing a legal thing; in fact, a thing which it was compelled to do.

Matter of Rapid Transit, 197 N. Y., 81:

In that case the city of New York undertook to justify building a subway under the streets without compensation to the adjoining owners, claiming that

the police power protected it from paying compensation. But the court said (97):

> "The construction of the subway comes within none of the apparent exceptions to the command of the Constitution that private property shall not be taken for public use without just compensation (art. 1, sec. 6). The appropriation of land in order to build it is not temporary, but permanent, and while necessary for a public purpose, *it is not necessary in order to protect the public from the danger of sudden and overwhelming calamity such as may spring from war, pestilence, or fire.* As was said by Judge Earl in an important case: *'There never can be any necessity, under the police power or the law of necessity, to permanently appropriate land to the public use without compensation.* It may temporarily be interfered with or appropriated; necessity may justify so much; but when the necessity passes away, the right ceases.' (*Matter of Cheesebrough*, 78 N. Y., 232, 237)." (Italics are ours.)

Bent vs. Emery, 173 Mass., 495:

A statute enabled the City of Boston to dredge certain flats and deepen water to improve navigation and sanitary conditions. These flats were privately owned.

Held, that the owners were entitled to compensation, even though the change was made under the police power.

Parker vs. Commonwealth, 178 Mass., 199:

A statute limited the height of buildings within a certain described territory near the State House in Boston, in order to preserve the beauty of the city.

Held, that the owners of houses so restricted were entitled to damages. The provision of the Act was that persons could recover damages so far as the Act—

> "may deprive any person of rights existing under the statute."

Held, that this Act deprived them of such rights and that their damages ought to be assessed.

As regards such a law providing against compensation, the Court said:

> "Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so."

Mt. Hope Cemetery vs. Boston, 158 Mass., 509, 521:

> "But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation."

All these authorities consistently hold to the principle — that where the damage arises either in a

limitation in the use of property, or through the destruction of that property, because the continued free use or the continued existence of the property would be harmful to the public, then no compensation need be made. But wherever these conditions do not exist then the power exercised is not the true police power. It lacks the vital element of police power which alone justifies the destruction of property without compensation, *i. e.*, that the use of the property or the continued existence of the property is a menace to the public.

Wherever that element of danger to the public is not present, or, to express it differently, wherever the maxim of *sic utere tuo ut alienum non laedas*, does not apply, then all excuse for a destruction without compensation is absent, and such destruction becomes oppression pure and simple, without logical foundation to support it.

We confidently assert that no case can be found in the books where, under the guise of the police power, one private individual has been held authorized to work *destruction on his neighbor's property with or without compensation*, in any case except where that property was a dangerous nuisance.

And even in such case, when property is destroyed as a nuisance even by state officials, *the right to a jury trial is preserved to the injured owner* in order to determine whether or not it actually constituted a nuisance. If the jury finds it not a nuisance, damages may be assessed:

Frank vs. Talty, 72 Ga., 428;

Verder vs. Ellsworth, 59 Vt., 354;
Loesch vs. Koehler, 144 Ind., 278 (35 L. R. A. 682);
Miller vs. Horton, 152 Mass., 540 (10 L. R. A. 116).

But in the case of our property, admittedly no nuisance, having within it no element of danger to the public, lacking every indication of that

"overwhelming calamity"

or

"immediate necessity"

which alone is said to justify destruction of private property under the police power (*Philadelphia vs. Scott, supra*),—in our case there is to be no hearing by jury or court, and $25,000 or over of property is to be swept away by the nod of an under-official of the City of Pittsburgh in order to aid defendant-in-error to gain 6½ inches additional space for its store building.

Look, now, at the case at hand: Without our consent, the defendant-in-error came upon our property, which was being operated as a theatre and rented at the rate of $40,000 a year. It at once rendered the house untenantable, and it thereby became vacant and remained so for many months thereafter. It tore out one whole side of the building, erected a dust screen twelve feet back from the line, destroyed all the plumbing, the electric wiring, the decorations, etc., on that side of the house, causing damages which it actually cost nearly $20,000 to repair (Rec. 35-42). It not only built half of a thirteen-inch wall twelve stories high on our prop-

erty but it also built the foundations for that wall which extend *from 7½ to 8 feet into our property.* These foundations lie thirty-three feet below the curb (Rec. 15-18).

V.

UNDER THE POLICE POWER, THE USE OF PROPERTY CAN BE REGULATED OR RESTRICTED FOR THE BENEFIT OF THE COMMUNITY AT LARGE ONLY, AND NOT IN THE INTEREST OF A PRIVATE INDIVIDUAL OR CLASS.

The police power is a power to be exercised for the benefit of the public, not for the benefit of a private party.

Although the power of eminent domain carries with it the necessity of making full compensation, the legislature may not authorize it to be used for private purposes or for the benefit of private persons.

No more can the legislature authorize the police power to be used for the benefit of private persons.

Where there is no actual appropriation, the use of property may be regulated under the police power, without the necessity for making compensation. But the reason for this is that the police power is exercised only for the benefit of the general public. When the regulation is made in the interest of a single person or class, the justification of the exercise of the police power ceases to exist.

If the attempted exercise of police power gives to one person some right in another's property not af-

forded to the community at large, it will amount to the taking of property of one person and giving it to another.

The purpose of the statute, the lower court held, is to enable one neighbor to erect half of his wall on the land of his neighbor, to do so just when it suits his convenience, and to build just such a structure and just such a wall as he chooses, regardless of whether it is necessary or can be used for the adjoining property.

The erection of a party wall and its dimensions and character are not determined by consideration of public interest or the welfare of the community at large; they are dictated by the convenience and selfish interest of the owner who wishes to build.

A case very similar to this is that of—

Eubank vs. Richmond, 226 U. S., 137:

A city ordinance made it the duty of the committee on streets, upon the request of the owners of two-thirds of the property on one side of the street, to establish a building line on such side, but not to be less than five, nor more than thirty, feet from the street line.

By proceedings under this act, a building line was fixed in front of the property of the plaintiff in error, 14 feet from the true line of the street, and on a line to which a majority of the houses were already conformed. The plaintiff in error built this house so that

a bay-window projected 3 feet over the line, and was fined for violating the ordinance.

In declaring the ordinance unconstitutional, this court ,by Mr. Justice McKenna, said (143, 144):

> "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. * * * The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

These comments apply with even greater force to the case at bar.

The Party Wall Statute not only authorizes an owner to determine the use which his neighbor can make a strip of his property, but authorizes him to occupy it himself and prevents the neighbor from using it as he wishes.

The statute confers on one owner the power virtually to control and dispose of the property rights of another.

The statue creates absolutely no standard whatever by which the power thus given is to be exercised,

i. e., no standard to determine the kind of a party wall, or the conditions under which it may be erected, or the amount of the neighbor's land which it may occupy.

Finally, as this Court said in the Eubank case, the statute—

> "enables the convenience or purpose of one set of property owners to control the property rights of others."

The circumstances of our case are much more extreme than those of the Eubank case, and the interference with the property of another much more serious and far-reaching. In the Eubank case the only effect of the ordinance was to deny the owner the right to project a bay-window 3 feet over the line fixed by the ordinance. This right, the Court said, could not be interfered with by a vote of the majority of his neighbors.

Indeed, under the doctrine declared in the court below, if a twenty-five story office building were erected with its wall just within the dividing line, the adjoining owner could immediately after remove such wall so as to permit the erection of a party wall—it may be for a one-story garage or shop. This right he can exercise in season and out of season, without regard to convenience and no matter how inequitable his action may be.

Missouri Pacific Ry. vs. Nebraska, 217 U. S. 196, 206:

A statute in Nebraska requiring a railroad company to put in switches at its own expense, upon the

application of the owner of a grain elevator, was held void.

Mr. Justice Holmes said:

"It is also true that the States have power to modify and cut down property rights to a certain limited extent without compensation, *for public purposes*, as a necessary incident of government—the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away. * * *

"This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs and, possibly, without regard to place. * * * Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

"But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason." (207)

Dobbins v. Los Angeles, 195 U. S. 223, 236:

"In *Lawton vs. Steele*, 152 U. S. 133, 137, Mr.

Justice Brown, speaking for the court, said upon this subject:

"'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that *the interests of the public generally, as distinguished from those of a particular class,* require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'"

To the same effect see *Oregon Railroad & Navigation Co. vs. Fairchild*, 224 U. S. 510.

VI.

THIS PARTY WALL STATUTE IS NOT A REGULATION IN THE INTEREST OF THE PUBLIC SAFETY, HEALTH, MORALS OR CONVENIENCE.

Originally, party walls were erected solely by agreement between the owners of adjoining properties. These walls separated one building from another, and, in the absence of any legislative restriction, the owners might erect any sort of wall they chose, without regard to strength or resistance to fire.

Hence, regulation became necessary and the early statutes prescribed the strength and thickness of party walls which might be built by agreement of the parties.

An authoritative statement of the history of party wall legislation and its purpose in England will be found in *Gibbons on the Law of Dilapidations & Nuisances*, 1st Ed., published in England in 1838, in which the author says (110):

> "The object of the statute is to prevent fire, and for that purpose it provides for the more effectual separation of houses by party walls, and was *certainly not intended to encourage close and contiguous buildings.* * * *
>
> "This enactment strongly shows that it was not the intention of the Legislature to authorize an encroachment by one person on the land of another; and the only case to which the 14th Section can apply is where two houses, having a common party wall, are pulled down and rebuilt, and a new party wall built."

In the second edition of this work, published in 1849, the learned author, in speaking of the *Act of 14th George III.*, c. 78, says:

> "It did not confer any authority to one man to build half the side wall of his house on his neighbour's land." (262.)

In *Traute vs. White*, 46 N. J. Eq. 437, 441, the court said:

> "There is a clear distinction and no necessary connection between legislative regulation of the

size and character of the walls of buildings in crowded cities, and legislative authority to one man to build a wall on his neighbor's land with the view of conferring a benefit upon him. The former is justifiable and proper as a police regulation, to prevent the spread of fire, and to guard against the danger of falling buildings, and that, I understand, the history of the legislation in regard to party walls shows to be its origin."

The early statutes in Pennsylvania upon which the court below placed great stress were likewise statutes which regulated the safety of party walls to be built by mutual agreement and did not authorize one owner to locate part of his wall upon his neighbor's land without the latter's consent (see infra, p. 119).

Section 9 of the Act of 1895 contains no requirement whatever as to the strength, thickness or materials to be used in party walls.

It does not require the builder to do anything to make the wall safe.

The same is true of the earlier Party Wall Act of April 8, 1872, P. L. 986, of which this section 9 of the Act of 1895 is a substantial re-enactment.

All that these statutes attempt to do is to authorize one owner to build a wall partly upon the land of his neighbor.

All that he has to do is to decide that it is for his interest to locate the wall partly on his neighbor's property.

Then his right is absolute. No official and no court can stop him.

There is no inquiry as to whether a party wall under these circumstances will be advantageous or economical or safe.

The Act says nothing about thickness of walls or character of materials or construction or any other consideration which will determine the safety of the party wall.

There is no such requirement in section 9 of the Act of 1895 nor in the Act of 1872.

Other legislation regulates the strength and character of walls generally to be built in the City of Pittsburgh; but there is no requirement in any statute that a party wall be of a different or better construction or material than any other kind of wall.

This, we repeat, is a demonstration that—

(1) These acts of 1895 and 1872 as to party walls were not enacted in order to make such walls stronger or safer than they would otherwise have been; and,

(2) Their sole purpose was to authorize one owner to build his land in part on the land of another.

How, then, can these statutes be declared an exercise of the police power?

As this court said in *Eubank vs. Richmond*, 226 U. S. 137, 143 (*supra*, 55):

> "In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while *conferring the power on some property holders to virtually control and dispose of the proper rights of others*, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how *public comfort or convenience, much less public health*, can be promoted by a line which may be so variously disposed."

A clear case of the exercise of the police power in the interest of public safety is presented by the case of—

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531.

In this case, a statute of the State of Pennsylvania requiring owners of adjoining coal properties to leave pillars along the division line was held constitutional.

The Supreme Court of Pennsylvania, in its opinion in this case (Rec. 118) cites and relies upon its opinion in the Plymouth Coal Company case, reported in 232 Pa. 141.

But in the Plymouth Coal Company case, it was admitted that the mining of coal was a dangerous occupation and a proper subject for the police power.

On page 540 of the opinion of this court in that case, Mr. Justice Pitney says:

> "That the business of mining coal is attended with dangers that render it the proper subject of regulation by the States in the exercise of the police power is entirely settled * * *.
>
> "Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employes of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the power * * *.

"All of this is very frankly admitted by plaintiff in error, and the criticism upon sec. 10 of the act is confined to the single ground that the method of fixing the width of the barrier pillar is so crude, uncertain, and unjust as to constitute a taking of property without due process of law."

VII.

THE PARTY WALL ACT, AS CONSTRUED AND APPLIED BY THE COURT BELOW IN THE INSTANT CASE, IS AN UNREASONABLE EXERCISE OF THE POLICE POWER.

In all except a very few states party walls can be erected only by voluntary agreement of the owners. Compulsory party wall statutes have not been favored.

Even if the party wall statute in this state might be upheld, which we deny, its application in this case is so arbitrary and unreasonable as to exceed the limits of the police power.

The Party Wall Act expressly provides for the removal of a *party* wall when the same "shall become impaired" or "unfit or unsafe for the purpose of erecting a new building or buildings upon the adjoining lot."

In this case, the superintendent is given the power to determine what proportion of the cost of the new wall shall be borne by each owner.

But there is no provision in the act with reference to the removal or tearing down of a wall built by an

owner along the dividing line but entirely within his lot.

In view of the fact that the act expressly provides for the removal of a party wall and is silent on the removal of a private wall, the reasonable inference, we submit, is that the statute did not contemplate the removal of a private wall entirely on the owner's property after the same had been erected without objection from the adjoining owner, and was not intended to authorize such removal.

This point is urged here, not for the purpose of revising the interpretation placed by the highest court of the state upon one of its statutes, but for the purpose of showing how unreasonable is the power which the court below held was conferred by the statute upon a private owner.

The effect of the court's interpretation of the statute, is this:

The owner who builds first may wish to erect a party wall and his neighbor may not be yet ready to improve his property or may not wish to join in the party wall. The first owner, therefore, may erect his wall entirely on his own lot. At any time later—it may be generations afterwards—the adjoining, or second, owner can compel the erection of a party wall on the same dividing line; he can enter upon property of the first owner, tear out a wall entirely on the latter's lot, doing whatever damage is necessary to the latter's building in order to erect the party wall, and the first

owner is wholly without remedy or right to compensation.

An even more inequitable situation is this: The first owner has built a wall adjacent to but within the dividing line. The second owner desires to build and finds that, to erect a party wall, he must tear out the wall of the first owner at additional cost to himself and at great damage to the first owner. The reasonable and fair thing for the second owner to do is to build his wall entirely on his own property. But if he does this, the lower court rules, he places his wall at the mercy of the first owner. The latter may decide to erect a larger or more improved building and therefore tear down his old one and proceed to erect a party wall on the dividing line. The court below held that he can do this and that he can tear out the wall of the second owner and wreck his building without paying him any compensation whatever.

In a large city, every lot in the business section has been built upon one or more times. For several generations, the owners of adjoining lots may have built buildings entirely on their own land, observing the dividing line and erecting no party wall, and one building has been succeeded by another located in the same manner. It will ordinarily be very difficult to determine which lot was built upon first; yet, under the decision of the court below, it makes no difference that for a century or more, two adjoining lots have thus been occupied by separate buildings without any party wall. At any time—one hundred or two hundred years after the first buildings were erected,—one of the

owners can elect to build a party wall and tear out as much of his neighbor's wall and do as much damage to his building as is necessary in order to erect the party wall.

This is not an unusual or an extreme case; this is what occurs in perhaps the majority of cases in a city as large and as old as the City of Pittsburgh. It is exactly what occurred in the case at bar.

In 1885, the walls of the building now used as a theatre were erected on the Jackman property. At that time, the adjoining property, then owned by William Stanton, was built upon up to the dividing line, but the wall was entirely on Stanton's property. No party wall had been erected. If the owner of the Jackman property had wished to erect a party wall, he could not have done so without tearing out Stanton's wall and damaging the building.

If Jackman had done so and erected a party wall partly on Stanton's property, then to-day, under the statute, when the Rosenbaum Company came to tear down this party wall, it would have had to pay the cost of replacing it, or such portion of the cost as the Superintendent of the Bureau of Building Inspection fixed.

Instead of tearing out the adjoining wall of Stanton, the wall of the theatre building was built within the line of the Jackman property. Thirty years later, the Rosenbaum Company purchased its present property, and proceeded just as if no buildings had been erected on either property and no rights or equities had occurred.

It tears out Jackman's entire wall and wrecks his theatre; constructs concrete foundations extending 7½ feet over on his property and 30 feet below the curb, and these foundations reached from one end of his lot to the other. It erects a framework of structural steel and on this hangs a thin brick wall, unable to carry its own weight, twelve stories high—100 feet higher than the Jackman theatre—and extending 6½ inches over the line onto Jackman's property. It builds this wall of rough brick up to the roof of Jackman's theatre, doing just enough to shut in and protect its own building, and then leaves Jackman to rebuild and restore his theatre.

The Supreme Court ruled that the Rosenbaum Company could do this and that Jackman could recover nothing.

The validity of the Party Wall Act of 1895 must be determined just as if the legislature had, in express terms, said that an owner could do the very acts which the Rosenbaum Company did and without paying any compensation to the adjoining neighbor.

A statute which so provides, we submit, is an unreasonable exercise of the police power.

How unreasonable this is, will appear from a comparison with this analogous situation where there no party wall legislation is in question: Where an owner locates the wall of his building over the dividing line and on his neighbor's property, and the neighbor stands by, knowing of the occupation of his land and makes no

objection, the latter is estopped and may not later insist upon the removal of this wall.

Steel vs. Smelting Co., 106 U. S., 447, 456,

In this case, the owner who encroaches is a mere trespasser. He is without a shadow of right to occupy his neighbor's land. Still, he builds his wall on land which his neighbor owns in fee and is allowed to keep it there. In our case, Jackman built his wall entirely on his own property. He did not trespass or encroach on his neighbor's land. A wall on his neighbor's property prevented him from building a party wall without additional cost to himself and loss to his neighbor.

Under these circumstances, every element of reason and justice is in favor of Jackman and of his right to keep his wall on his own property where he built it.

But the Supreme Court holds that the Rosenbaum Company, whose land has never been encroached upon but has been so built upon as to prevent Jackman from building a party wall, can now, itself, build a party wall and remove the Jackman wall. The right of the Rosenbaum Company rises higher than the right of an owner whose property had been built upon by a mere trespasser. The Rosenbaum Company can remove a wall built entirely on the land of another, whereas, in the other case, the owner cannot remove a wall built upon his property by a trespasser.

Under the ruling in the court below, the only way an owner can safely erect a side wall to his building near his neighbor's line is this: He must erect a party wall. No matter what improvement he may find on

the adjoining property, he must tear out any wall which interferes with his party wall, if necessary the wall of a twenty-five story modern office building. Then, if he erects his party wall, he will be safe until his neighbor wishes to displace this party wall as "unfit" for the kind of building the neighbor wishes to build. Thereupon, our owner will have to pay no greater proportion of the cost of the new party wall than the Superintendent of the Bureau of Building Inspection thinks he ought to pay.

Further, every owner of a building is placed in this dilemma: He may not want a party wall at all for his own purposes. His neighbor, who is not ready to build, will refuse to say what kind of party wall he wants or whether he wants a party wall at all.

Then the first owner must build some kind of party wall over the dividing line and take his chances of his neighbor's tearing down this party wall as unfit for the latter's building and take his chances of what the superintendent will say he must pay as his share of tearing down his own wall and erecting the party wall his neighbor demands.

And so on, *ad infinitum*. There is no end. He is allowed no right except to play the same game on his neighbor.

The prudent step for an owner to take in order to protect himself should be to erect his wall entirely on

his own lot. But if he does this—and this is what Jackman did—then, under the ruling of the court below, he is at the mercy of his neighbor who may at any time raze his wall, wreck his building and compel him to restore it at his own expense.

All this is done by a party wall act which the court below says was enacted to promote the public safety or convenience.

Again, the Party Wall Act of 1895 is unreasonable because it leaves to the owner who wishes to build the uncontrolled right to decide whether a party wall shall be erected and the kind of wall, whether the proposed party wall will be suitable or economical, whether there shall be a party wall at all under the conditions and circumstances, whether, in the light of buildings previously erected and rights accrued therein, it will be just to permit the removal of existing buildings. All these questions are irrelevant.

The statute says that if any owner chooses to build a party wall where none has been erected before, he can do so and he need not compensate anyone for any resulting loss.

His fiat is all that is necessary and the courts are bound to protect him from any liability for the damage he inflicts on his neighbor.

If this be an exercise of the police power, which we deny, it is unreasonable.

As the court said in *Eubank vs. Richmond*, 226 U. S. 137, 144,—

> "This, as we have said, is the vice of the ordinance, and makes it, we think, an *unreasonable exercise of the police power.*"

In *Southwestern Telegraph Co. vs. Danaher*, 238 U. S. 482, 489, Mr. Justice Van Devanter said:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve."

Myles Salt Co. vs. Iberia Draining District, 239 U. S. 478:

A statute of Louisiana authorized a police jury to organize drainage districts, and such a jury included in a district an island having a high elevation and in no way capable of being benefited by the drainage.

In holding that the action of the jury amounted to a taking of property without due process of law, this court, by Mr. Justice McKenna said:

> "It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented

is Federal and the motion to dismiss is denied. (484) * * *.

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay *for the benefit to other property,* there is *an abuse of power* and an *act of confiscation. Wagner v. Baltimore,* ante (239 U. S.) p. 207. We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of *the property of* others—*power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind.*" (485)

In *Welch vs. Swasey,* 214 U. S. 91, 105, in discussing statutes prescribing the heights of buildings in different sections of the City of Boston, Mr. Justice Peckham said:

"The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation

of many authorities. If the means employed, pursuant to the statute, have no real substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the court will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler vs. Kansas,* 123 U. S. 623, 661; *Minnesota vs. Barber,* 136 U. S. 313, 320; *Jacobson vs. Massachusetts,* 197 U. S. 11, 28; *Lochner vs. New York,* 198 U. S. 45, 57; *Chicago Railway Company vs. Drainage Commissioners,* 200 U. S. 561, 593."

Other cases holding that the exercise of the police power by the state must be reasonable, are:

Dobbins vs. Los Angeles, 195 U. S. 223, 239;
Great Northern Ry. Co. vs. Minnesota, 238 U. S. 340, 347;
Chicago, Milwaukee & St. Paul R. Co. vs. Wisconsin, 238 U. S. 491, 500;
Jacobson vs. Massachusetts, 197 U. S. 11, 28;
Lochner vs. New York, 198 U. S. 45, 56:

VIII.

NO COMMON LAW RIGHT TO ERECT A PARTY WALL PARTLY UPON ANOTHER MAN'S LAND, WITHOUT HIS CONSENT, IS RECOGNIZED IN PENNSYLVANIA OR ELSEWHERE.

It cannot be argued that the general principles of party wall law may have been adopted by the State of Pennsylvania as a part of the common law of

England and therefore may constitute a *common law limitation* upon the use and enjoyment of property.

We find absolutely no intimation in the authorities supporting that suggestion.

Party walls are probably in existence in all the States of the Union. In a very few states besides Pennsylvania, as in Iowa, Louisiana and the District of Columbia, they seem to be provided for by statute. In all other states, however, they exist only under agreement of the parties. No case has been found in any jurisdiction which claims that the right exists *to compel an adjoining owner to submit to erection* of such a wall at common law.

In *Hoffstot vs. Voight,* 146 Pa., 632, 636, the court said, in speaking of party walls:

> "* * * such regulation, as it exists in this and most other States, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant."

We submit that if the power is to be controlled by the strict extent of the statutory grant, that statute is not declaratory of an existing common law but is derogatory therefrom.

Shell vs. Kemmerer, 13 Phila., 502:

An injunction was sought to prevent defendant from putting a window in his wall which would overlook plaintiff's property.

The court held that there was no remedy by injunction to restrain such windows except in the party wall law, and that law did not apply to Dauphin County.

Whitman vs. Shoemaker, 2 Pears. 320:

This was an attempt to build a party wall by compulsory proceedings in Harrisburg under the Act of 1874, dividing cities into three classes, and it was decided that there was no power to erect it, as the statute did not apply to that city.

The report of the Judges, 3 Binn., 595 (1808), on the English statutes in force in Pennsylvania, makes no reference to any party wall statutes, although those laws were put in the form of statutes as early as the reign of Charles II., re-enacted in the reign of Queen Anne, and codified in a general statute in 1772, in the reign of King George III.

Jones on Easements (1898), sec. 641, says:

> "Aside from an agreement, express or implied, creating a party wall, this can exist only by force of statutory provisions or by prescription. Common law does not create such a thing."

See also *Washburn on Easements,* 2 Ed. (1867) p. 550.

In *Sherred vs. Cisco,* 4 Sanford, 480, many of the party wall cases are reviewed.

It was there held that where a party wall was destroyed by fire and a new wall rebuilt on the same location by one of the owners, the builder had no claim against the other lot owner, because in the absence of a new agreement, neither party had any right to build a party wall.

The Court, Sanford, J., said (486):

> "By the common law, every owner of land is his own judge of the propriety of building upon it or leaving it vacant; and when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases, and he is under no obligation to give to his neighbor any use or advantage of his land, by way of support, drip, or easement of any description. If a stranger dispossesses him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land."

In a *note* to *Boch vs. Isham,* 7 Am. L. R. (N. S.), 8, the following statement occurs (11):

> "Only a few of the general principles governing party walls independently of statutory enactments have been discussed in this country. Without a contract or statutory authority, no owner has a right to build his wall beyond his own line, and if he does so the adjoining owner may

treat it as a trespass and compel it to be taken down, or he may use it as a party wall without paying anything for it: *Sherred vs. Cisco,* 4 Sandf. 480; *Orman vs. Day,* 5 Fla., 385."

Pingrey on Real Property, Section 250, says:

"A party wall can only become such by statute, by agreement or by prescription."

In *Sanders vs. Martin,* 2 Lea. (Tenn.) 213, the Court, in discussing the rights of owners of a party wall, said (215):

"It seems certain that the common law does not recognize the right of the owner of land to compel the owner of an adjoining lot to build a party wall, nor can either demand contribution from the other for a wall erected, in whole or in part, on the land of such other person, nor for any incidental benefit the latter may derive from a wall erected entirely on the land of the builder. *Sherwood vs. Cisco,* 4 Sandf., 480; *Orman vs. Day,* 5 Fla., 385; *Abraham vs. Krantler,* 24 Mo., 69."

In *Spalding vs. Grundy,* 126 Ky. 510, 13 L. R. A. N. S., 149, the Supreme Court of Kentucky quotes this statement with approval, saying:

"It seems certain that the common law does not recognize the right of the owner of land to compel the owner of an adjoining lot to build a party wall."

List vs. Hornbrook, 2 W. Va., 340:

> "A party wall in the legal sense of the term, can only exist in one of two ways: either by contract or by statute; for the common law creates no such right."

We submit, therefore, that there is no common law principle existing to aid the defendant-in-error here; that there is no common law limitation upon the right of property subject to which we took our title; but that the whole law is statutory and, therefore, subject to the constitutional restriction that property shall not be injured or destroyed without due process of law.

IX.

IN ENGLAND, THERE NEVER HAS BEEN A COMPULSORY PROCEEDING TO ERECT A PARTY WALL, WHERE NO WALL EXISTED BEFORE.

A suggestion was made below that such a proceeding is inherited from the old English law.

That suggestion is entirely without foundation.

A study of the English cases and decisions will clearly show that, from the earliest times to the present day, there has been no such thing known in England as a compulsory party wall proceeding, compelling one man to permit the erection of one-half of a party wall on his land, where no common wall before existed.

For instance, it seems that under the very ancient regulations of party walls in London in the reign of

Richard I. (as quoted in 7 Am. L. Reg., N. S., 10), the matter rested entirely upon the agreement of the parties as shown by the following provision:

> "If any person shall wish to build the whole of a wall upon his own land, and his neighbor shall demand against him an assize, it shall be at his election either to join the other in building a wall in common between them, or to build a wall upon his own land and to have the same as freely and meretoriously as in manner already stated."

The first English general statute on the subject of party walls seems to be that of 19 Charles II, c. 3 (1666). See 8 *Pickering Statutes*, 233. The preamble to the statute recites that the city of London—

> "by reason of a most dreadful fire lately happening therein, was for the most part thereof burnt down and destroyed within the compass of a few days, and now lies buried in its own ruins; for the speedy restoration whereof, * * * and to the end that great and outrageous fires * * * may be reasonably prevented or obviated from time to time, both by the matter and form of such building, etc."

After providing certain general directions for the construction of houses and that there should be only four sorts of buildings permitted; that all buildings must be re-erected within three years, regulating labor, wages, etc., etc., providing for the opening and enlarging of certain streets, etc., the act provides, section 8:

> "That the said surveyors or supervisors so to be appointed as aforesaid, and every of them,

within their several precincts, shall take care, that in building of all houses within the said city and liberties thereof, there be, and it is hereby enacted by the authority aforesaid, that there shall be party walls and party piers, set out equally on each builder's ground, to be built up by the first beginner of such building; and that convenient toothing be left in the front wall by the said first builder, for the better joining of the next house that shall be built to the same."

This statute is practically the only example on the English statute books *directing* the building of party walls by *all owners*, not at the election of one; all others relating almost wholly to existing walls; and this statute was intended to simplify the work of rebuilding the city and reduce the amount of building to a minimum because of a great emergency.

In the Statute of 6 Anne, c. 31 (1707), 11 Pick. Stat., 416, the only provision relating to party walls is that after May 1, 1708,

"all and every house that shall be erected and built either upon old or new foundations, in any place or places in and about the cities of London and Westminster * * * shall have party walls between house and house, wholly of brick or stone, and of two bricks thick at the least in the cellar and ground stories and thirteen inches thick upwards from the foundation quite through the stories of each house, and eighteen inches above the roof."

The preamble recites that fires—

"might have been in great part prevented * * * if party walls of brick had been built between house and house * * * and less timber in the front of houses. * * *

"This law was intended to require walls between houses, to be of brick, not to authorize one owner to build on the adjoining lot."

The statute of 7 Anne, c. 17 (1708), 11 Pick. Stat., 498, provides—

"That all party walls that shall hereafter be built shall be built nine inches on each man's ground, whether the old party wall be brick, stone or timber, and that the first builders shall have power to pull down the same, and build up the new party wall as aforesaid, and be paid by the owner of the next house at the rate of £5 per rod as soon as he shall have built the said party wall; and for all houses hereafter to be built that shall not yield the rent of £20 per annum more than the ground rent, to be left at the discretion of the builders; provided, that all party walls for the same be built with brick."

The next statute is that of 11 George I, c. 28 (1724), 15 Pickering Statutes, page 254. This statute recites the provisions of 6 and 7 Anne, heretofore mentioned, and provides that anyone who shall think it necessary to pull down any party wall shall give three months' notice in writing to the adjoining owner;

whereupon, the wall shall be viewed by four or more able workmen—two to be named by each property holder.

These workmen must certify to the Justice of the Peace of the facts in the next general or quarter sessions that such party wall is *defective and ruinous and ought to be pulled down*, and if any person shall think themselves aggrieved by such certificate, the justices shall summon before them one or more of such workmen and such other person or persons as they shall think fit, and shall examine the matter upon oath "and upon such examination or examinations, the said justices are hereby authorized and required to make such order or orders in the premises as they in their discretion shall think just and reasonable."

The statute of 33 George II, c. 30 (1760), 23 Pickering Statutes, 82, provides that the court of mayor and aldermen of the said city shall appoint one or more able workmen to act with the workmen provided for in the preceding act in viewing the wall. Section 24 of the act provides for the character and thickness of party walls to be built thereafter. Section 25 relates to the rebuilding of party walls in houses built on the lands of other owners, which shall be "decayed," and provides that if all the parties interested are not willing to join in the rebuilding of such a party wall, then the mayor and court of aldermen shall summon a jury to try whether the premises ought to be rebuilt or not; and if upon the verdict that they should be rebuilt, the parties still cannot agree to the

rebuilding, then the jury shall be again empanelled and sworn,

> "to enquire and fix the value of the part or parts of the said house belonging to the person or persons so refusing or neglecting to signify, or being legally disabled from giving his, her or their consent to such rebuilding."

The statute of 4 George III, c. 14 (1764), 26 Pickering Statutes, page 25, provides that where houses are "so intermixed over or under each other" that a party wall cannot be built through all the stories, "in order to prevent mischiefs by fire," without pulling down some parts of the adjoining house, and disputes arise, the Justices of Peace in the General or Quarter Sessions shall summon a jury—

> "to view the premises, try the facts, and fix the value of any damages that may arise, on their verdict."

In 6 George III, c. 27 (1765), 27 Pickering Statutes, 135, there are contained only the general provisions relating to the character and thickness of party walls to be thereafter erected within the said city.

The Statute of 12 George III, c. 73, (Vol. 29, Pt. II, Pick. Stat. 217), contains the building law of London, and it was this statute which codified everything that preceded it regarding the building of party walls.

The Act provides (sec. 14) that if the premises be intermixed as under the preceding statute with the

property of other owners, under disability or unwilling to join, then, "in order to prevent the fatal effects of fire,"

> "any owner or proprietor of any such house or other building * * * (shall be) desirous of rebuilding his, her or their house or houses or other buildings (he) shall give notice in writing to the owner or owners of such house or houses or other buildings which already or shall thereto adjoin, that he, she or they so intending to rebuild, will apply to the Court of Mayor and Aldermen of the City of London * * * in order to obtain the judgment and determination of the said court * * * touching the rebuilding of the house or houses or other buildings or party walls to be described in such notice, and for ascertaining the site of the perpendicular party wall or party walls to be built according to the directions and restrictions in this Act contained and described."

The Act then provides that the said Court of Mayor and Aldermen shall issue their warrant to the sheriff to summon a jury of twelve persons, with authority to call all persons thought proper or necessary to be examined as witnesses, and the jury may be directed to view the premises, and the jury shall have power, *inter alia*,

> "to fix, ascertain and award what (if any) compensation or recompense should be made, given and paid by any or either of the said parties in difference to the other or others of them in lieu of the lessening either of the said houses, or other buildings, by such perpendicular party wall or

party walls; and the said Court of Mayor and Aldermen, and the said Sessions respectively shall give judgment according to such verdict, as well for the site of such intended party wall or walls as also for such sum or sums of money (if any) so to be assessed by the said jury; and shall and may (if they shall see fit) award to either of the parties such costs as they shall deem just and reasonable."

The above statute did not appear to be satisfactory and the statute of 14 George III, c. 78, was passed in the year 1774 and contained a most comprehensive code for the erection of buildings, walls and party walls in the City of London (see 30 Pick. Stat., 483).

Under this code, buildings are divided into seven classes and elaborate provisions are made for the thickness and composition, first, of walls not party walls, and second, of walls which constitute party walls. In section 14, the following provision occurs:

"And it is hereby enacted by the authority aforesaid, that from and after the said 24th day of June (1774), every house or building hereafter to be built, and being of the first, second, third or fourth rate or class of buildings, hereinbefore directed, and not having each of them a separate and distinct side wall on the part or parts where they are or shall be contiguous, shall have party walls between house and house or other buildings or between so much of said house and house or other buildings as shall not respectively have such separate and distinct walls as aforesaid";

and then providing the composition and thickness of said party walls.

After providing concerning the heighth of party walls, openings and beams in them, etc., making provisions for the building of chimneys, etc., the statute then provides in Section 33, that in cases where no party wall or party arch can be built between buildings over public ways or having rooms intermixed, then, "in order to prevent the fatal effects of fire," if any owner shall be

> "desirous of rebuilding such house or other building,"

and the adjoining owner will not agree, then the building owner shall apply to the mayor and alderman of the City of London and give notice to the adjoining owner; and the mayor and aldermen shall empanel a jury of twelve persons, which jury shall hear witnesses and if necessary, view the premises, and then shall inquire whether the premises ought to be rebuilt or not; and if so, shall determine the site of the party wall, the quantity of the soil or ground necessary to be laid to or taken from the house of the person desiring to rebuild (501)—

> "and shall ascertain and award what, if any, compensation should be made, and paid, by either or any of the said parties in difference to the other or others of them in lieu of the lessening, either of the said houses, or other buildings, by such party wall or party walls, party arch or party arches, or as a satisfaction for such other injury (if any) as shall be done, or occasioned thereby to any or

either of the said parties and shall also ascertain and award what proportion of the expense of building such party wall or party walls, party arch or party arches, shall when the same are so built, be repaid by either or any of the parties in difference to the person or persons so rebuilding as aforesaid."

It was ruled in *Barlow vs. Norman*, 2 Wm. Blackstone, 959 (1774), *that a new wall could not be built under this act against the other party's objection.*

Trespass for pulling down a wall. The question on demurrer was—

"whether under the statute Geo. III., c. 73, for regulating buildings in London, a person building a new house upon an entire new foundation, was entitled to build his side or flank wall, half on his own ground, and the other half on the vacant ground of his neighbor; or whether that provision extended only to party walls between houses already built, or carrying up at one and the same time."

It was there held by Gould and Blackstone, Justices (*absentibus* De Gray, Chief Justice, and Nares, Justice,) that this statute *extended only to the latter case.*

IT SEEMS, TOO, THAT UNDER THESE ACTS COMPENSATION WAS ALLOWED TO THE ADJOINING OWNER FOR CONSEQUENTIAL DAMAGES CAUSED BY THE RAISING OF A PARTY WALL.

Wells vs. Ody, 32 Eng. C. L. Rep. (7 Car. & Payne, 410), 560:

Action in case for obstructing lights by raising the height of a party wall. Proceedings were carried through under the Statute 12 George III., for raising a party wall from a height of nine feet to seventeen feet at one end and thirteen at the other. Plaintiff's ancient lights were darkened by the raising of the wall on the part of his house extending to the rear.

Plaintiff argued (561):

"That as this wall was built according to the provisions of the building act, the defendant was protected by that act; and that, therefore, no action would lie for any injury to the enjoyment of light occasioned by the wall."

Parke, J., said (561):

"I doubt whether the building act applies to a case of consequential damage, by darkening of lights—my strong impression is that it does not apply to an action like the present."

In charging the jury, the judge said (561):

"The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation. With a view to one of the points of law raised by Mr. Kelly, I must also ask you whether you think that

the defendant's having built on his own premises has caused any more injury than if the defendant had built on the plaintiff's half of the wall only."

The jury retired and found a verdict for the plaintiff. A rule to show cause was obtained why a nonsuit should not be entered, which was discharged,

"the court being of opinion that the building act *did not apply to protect persons from actions brought for injuries arising from collateral consequences resulting from buildings erected under that act, and, also, that under the circumstances of this case the present form of action was proper.*" (Italics are ours.)

Titterton vs. Convers, 5 Taunt., 465 (1814):

Held, that the Building Act of 14 Geo. III., c. 78, has not destroyed the right to lateral windows which existed before that act, and plaintiff having brought an action in case for damages for their construction and recovered a verdict thereon, *it was held that he was entitled to his verdict.*

See also *Reg. vs. Ponsford,* 7 Jur., Part 1, p. 767:

In that case an adjoining owner tore down an existing party wall and built a new one,

"but the paper, painting and other decorations of Brownraiggs' house had been destroyed to the value of more than £100. Application had been made to the defendant to make good this damage, but he had refused to do so."

Plaintiff thereupon asked for a mandamus to compel him to do so. The following colloquy took place (768):

"(Wightman, J.): (What injury has your client sustained here?) The destruction of handsome paper and ornaments. The defendant, Ponsford, though he had built up the brick work, yet had not replaced the paper. (Wightman, J.: Then why not bring an action?) An action had been brought in *Robinson vs. Lewis* (10 East., 227), but it had been there held an action would not lie. (Wightman, J.: But that was under different circumstances to the present.) It is submitted that if mandamus will not lie, Mrs. Brownraigg has no remedy.

"Wightman, J.:

"*That is not so, for if you have sustained any damage by the proceedings of the defendant, you can have your action.*

Under the Metropolitan Building Act of 1855, 18 and 19 Victoria, c. 122, the following rights were given to the building owner. The clauses are not quoted in full, but an abstract only given:

(1) A right to make good or repair any party structure that is defective or out of repair;

(2) A right to pull down and repair any party structure that is defective or out of repair;

(3) A right to pull down any timber or any partition which divides any buildings and which is not con-

formable with the regulations of the Act, and to build a party wall conformable to the Act;

(4) Where there is mixed property, a right to pull down any part of the partition wall not built in accordance with the Act and to rebuild it properly;

(5) Where buildings are connected with arches over public ways, etc., a right to pull down such arches as are not built in conformity with the Act and to rebuild them properly;

(6) A right to raise any party structure

"upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishing and decorations thereof;"

(7) A right to pull down any party wall that is of insufficient strength for any new building intended to be built and to rebuild the same of sufficient strength,

"upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof;"

(8) "A right to cut into any structure upon condition to make good all damage occasioned to the adjoining premises by such operation;"

(9) A right to cut away any footing, etc., of any party wall for the purpose of erecting an extraordinary wall against said party wall,—

"upon condition of making good all damage occasioned thereby to the adjoining premises by such operation;"

(10) A right to cut away any part of a party wall overhanging the ground of the building owner in order to erect an upright wall—

"on condition of making good any damage sustained to the wall or building by reason of such cutting away or taking down;"

(11) "A right to perform any other necessary work incident to the connection of party structure with the premises adjoining thereto."

It will be noted under this Act that the right to damages is not expressly given where the existing wall is dangerous, out of repair and necessary to be rebuilt; but if the building owner wishes to make a new party wall for his own purposes, then he must make good all damages.

Under this Act it was held that the building owner was liable to the owner of the adjoining property for consequential damages.

Crofts vs. Haldane, 8 B. & S., 194 (1867):

Action in case arising under the Metropolitan Building Act of 1855 for damages for obstructing ancient lights.

One owner claimed the right to raise an existing party wall to an additional height, although in so doing he interfered with the ancient lights of the adjoining

owner. Under the Act the adjoining owner was given the right to raise the structure

> "upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof."

Held, that this gave him no right to darken the ancient lights of his neighbor.

Coburn, C. J., said (199):

> "Under this clause Mr. Clarke contends that the building owner has a right to raise the external wall as he pleases, though in so doing he interferes with the ancient lights of the adjoining owner. But no such power is given by the terms of that section, and we ought not to allow such unless it appears by express terms or irresistible inference that the Legislature intended to give it. So far, however, is the enactment from doing this that its language leads directly to the opposite conclusion. When it speaks of the building owner having a right to raise a party structure 'upon condition of making good all damage occasioned thereby to the adjoining premises,' it simply means if you do any structural damage to the building you must restore it to the condition in which it was previously. The legislature never could have meant that you are not only to make good any damage to the structure itself, but that you may damage the adjoining lights; to hold this would be doing the utmost violence to the language of the legislature. *Wells vs. Ody is a strong authority to show that unless*

a Building Act gives such a power as this it is not to be taken by implication." (Italics are ours.)

Blackburn, J., said, in speaking of the power of the legislature to provide for a wall which would cause injury to the neighbor by darkening his lights (201):

> "No doubt the legislature might have so directed, but I think they would pause before doing so, as it would be an interference with the rights of property."

Another suggestive case is that of *Weston vs. Arnold*, 43 L. J. N. S. (1874), 123:

A wall seems to have been a party wall for a part of the way up, and from that point on to have been a separate wall, belonging to one of the parties only. In this separate wall he had ancient lights. The other party undertook to make the party wall higher, proceeding under the Improvement Acts, and to obscure these ancient lights, but the Court awarded an injunction restraining him from doing so.

Lord Justice James said (127):

> "It is clear in this there was a party wall, and there was a separate wall, and that separate wall the plaintiff has got his windows in. He has got a right to those windows, and there is nothing in the Act of Parliament that can deprive the one man of his right to the windows for the benefit of the other man, or that has given the latter a right to raise his buildings so as to darken those windows. *There is nothing in the Act of Parlia-*

ment, in words or spirit, which can justify such transfer of a valuable property from one person to another without any reference to a question of public good in the City of Bristol or any other place." (Italics are ours.)

In a concurring opinion, Lord Justice Mellish said (128):

"What is wanted, in order that the defendant may make out his construction, is a section which says that where any party wall continues in height after it ceases to separate the two buildings, then the whole of that wall shall be a party wall. I do not think that was intended to be inserted, or that that was the meaning of the Act. At any rate, it is not in the Act, and of course *when the contention is that the private rights of an individual have been taken away from him and given to somebody else by a public Act of Parliament, and without compensation—for the compensation clause here clearly does not apply to this case—it ought to appear in perfectly clear and plain terms.* Here it does not so appear. On the contrary, the construction of the Act supports the plaintiff's case and not the defendant's."

An interesting discussion of the law of party walls is found in *Gibbons on the Law of Dilapidations and Nuisances*, 1st Ed., published in London in 1838. The author says (110):

"A party is only entitled to build half the side, or flank wall, on his neighbour's land, under this

section, where houses are already built both upon his land and his neighbour's which adjoin, *and the wall is substituted for a former party wall, or where he and his neighbour build up houses together.* If John build on a vacant piece of ground, or rebuild a house next to a vacant plot of ground belonging to James, he has no right to assume that James will build on his land, and appropriate any part of it for his wall; and, besides, if the wall be not between house and house, it cannot be said to be a party wall. The object of the statute is to prevent fire, and for that purpose it provides for the more effectual separation of houses by party walls, and was certainly not intended to encourage close and contiguous buildings." (Italics are ours.)

After showing that under Section 23 of the Act, where one of the parties is not making use of an existing party wall, and the party who is making use of it afterwards tears it down, he cannot erect a wall on more than half of the ground covered by the party wall without agreement with the other party—the author then continues (112):

"This enactment strongly shows that it was not the intention of the Legislature to authorize an encroachment by one person on the land of another; *and the only case to which the 14th Section can apply is where two houses, having a common party wall, are pulled down and rebuilt, and a new party wall built.*" (Italics are ours.)

The author further states (113):

> "As the statute does not empower one man to encroach on the land of another in building a wall, neither does it give him authority to interfere with any other of his neighbour's rights. Thus he cannot raise a party wall on a party fence wall, if he thereby darken his neighbour's ancient windows."

The second edition of this same work, published in London in 1849, in speaking of the Act of 14 George III., c. 78, says (262):

> *"It did not confer any authority to one man to build half the side wall of his house on his neighbour's land,* nor did it authorize him to raise a party wall so as to darken his neighbour's lights." (Italics are ours.)

WE CAN CONFIDENTLY ASSERT, THEREFORE, THAT THERE NEVER HAS BEEN TO THIS DAY A COMPULSORY PARTY WALL STATUTE IN ENGLAND, COVERING THE CASE OF A NEW PARTY WALL WHERE NONE BEFORE EXISTED; AND THAT, THEREFORE, NO LIMITATION TO PROPERTY RIGHTS IS IN EXISTENCE IN THE STATE OF PENNSYLVANIA INHERITED FROM THE ENGLISH LAW.

The two English cases cited by the Court below, *Thompson vs. Hill,* 22 L. T. Rep., 820, and *Bryer vs. Willis,* 23 L. T. Rep., 463, are perfectly logical, both under the general propositions of law and under the construction of the Act. In the former, by reference to the case, it appears that the proceeding was under the

Metropolitan Building Act of 1855, sub-section 3, which confers the right, as quoted above,

> "to pull down any timber or other partition which divides any houses and is not conformable to the regulations of this Act, and to build instead a party wall conformable thereto."

There was an existing party wall not in compliance with the Act, consisting partly of timber, and, therefore, constituting a menace in case of fire, and for the reduction of that menace, of course, the party building a proper wall would not be liable to the other party.

In the case of *Bryer vs. Willis, supra*, there was an existing party wall, and it appears that the wall was upwards of one hundred years old, partly of timber and brick and partly of timber alone (463):

> "This was a party structure, but not in accordance with the provisions of the Metropolitan Building Act."

As in the former case, the building owner would not logically be required to make good necessary damages caused to the adjoining property by tearing out the wall, and the Building Act does not make him liable.

X.

THE DECLARATION OF THE SUPREME COURT OF PENNSYLVANIA, THAT THE PARTY WALL ACT IS A SETTLED RULE OF PROPERTY IN THAT STATE, DOES NOT CONCLUDE THE RIGHTS OF THE PLAINTIFF-IN-ERROR UNDER THE FOURTEENTH AMENDMENT IN THIS COURT.

The reasoning of the court below is as follows (Rec. 117):

> "The building of party walls upon division lines between lots in certain of the cities of this state, while regulaated by statute, has developed into the ordinary and natural way to use and enjoy real estate of that character, to such an extent as to 'become a settled rule of property' (*Heron v. Houston*, No. 1, 217 Pa. 1, 3), and, in effect, to make applicable the principle that every man is entitled to the ordinary and natural use and enjoyment of his property without being responsible to his neighbors for inconvenience or incidental losses which they may suffer through such enjoyment; . . .
>
> "If it be said the building-owner of a party wall (meaning the one at whose instance the wall is constructed) uses not only his own property but also that of his neighbor, the answer is: In communities where party walls have for generations been recognized and regulated by legislation, such as the cities of Philadelphia and Pittsburgh, each adjoining lot owner, for party wall purposes, has what is tantamount to an easement of support in the premises of his neighbor (see note to *Bloch vs.*

> *Isham,* 92 American Decisions 287), to the full enjoyment of which he is entitled whenever he erects a wall of that character. . . . The present proposition comes to this: The strip of land, the middle of which constitutes the dividing line between plaintiff's and defendant's properties, was dedicated, in theory of law, for party-wall use."

The foundation of this settled rule of property, the court says, is a series of acts of the legislature.

But, as will be shown later, the earlier acts merely provided the machinery for locating boundary lines and regulating the thickness and materials of party walls in the interest of public safety. They did not authorize an owner to encroach upon the land of his neighbor without the latter's consent.

Even the Acts of 1872 and 1895 relating to party walls in Pittsburgh do no more than authorize an owner to locate his wall partly on his neighbor's land. These statutes do not say that the owner may tear out an existing wall on his neighbor's land, much less do this without liability for the damage he does.

Indeed, the Acts of 1872 and 1895 expressly provide for the removal of existing *party* walls, and the omission of any such provision with reference to other walls along the division line would seem by implicatioin to amount to a declaration that the latter could not be removed without the consent of the owner.

So then this settled rule of property law, as announced by the court below, cannot be derived from the statute. It is evolved in this way:

The legislature in these later statutes has declared that an owner may build part of his division wall on his neighbor's land. This is all that the legislature says.

But the Supreme Court of the state interprets this statute as making in addition two other provisions,—by implication, it must be:

(1) It authorizes an owner to tear down any wall on his neighbor's land which may interfere with the kind of wall he wishes to build;

(2) It takes away the neighbor's right to recover any compensation for damage to his wall or building.

The Supreme Court then adjudges and declares the statute *as thus interpreted by it*, to be a settled rule of property law.

All this is in derogation of the common law and is a serious interference with the rights of an owner of land.

What are the limits of this "settled rule of law", it is difficult to determine. The court below says that—

> "the strip of land . . . was dedicated, in theory of law, for party wall use." (Rec. 117.)

But what is a 'strip of land"? Is it 6½ inches, one-half the thickness of an ordinary wall three bricks thick?

Or is it a strip 7½ feet wide, occupied by concrete foundations thirty-three feet deep?

The court holds that this strip is at least as wide as in the latter case. If the rule of law extends to a strip 7½ feet wide, why will it not, by the same reasoning, extend to a strip 10 or 20 feet wide, or as wide as the ordinary lot in the down-town portion of a large city?

Again, the court says that this strip is "dedicated".

But what element of dedication can be found in these party wall statutes? At common law, a dedication of a strip of land or right of way is made for the benefit of the *public* and can only be made with the *consent of the owner*:

Irwin vs. Dixion, 9 How. 10, 30.

Here the owner consents to nothing. One might just as well say that the taking of land under the power of eminent domain is a dedication by the owner.

The strip is not "dedicated" to the use of the public. It can be used by no one except the adjoining owner.

In reply to the assertion of the court below that the acts complained of in this case were authorized by a settled rule of property law, we submit:

(1) This court must examine and determine for itself whether there exists in Pennsylvania a settled rule of property which sanctions what was done in this case;

(2) The decision of the Supreme Court of Pennsylvania, relied upon, was rendered after the plaintiff-in-error acquired his property and his rights therein had been fixed;

(3) No such rule of property can be found in the statutes or decisions of Pennsylvania.

XI.

THIS COURT MUST EXAMINE AND DETERMINE FOR ITSELF WHETHER THERE EXISTS IN PENNSYLVANIA A SETTLED RULE OF PROPERTY WHICH SANCTIONS WHAT WAS DONE IN THIS CASE.

The court below held it to be a rule of property law in the state, that an owner has an easement in the land of his neighbor for the purpose of erecting a party wall.

If there were no such rule of property, then, clearly, the statute and the ruling of the court would present a plain case of the taking of the property of one person and giving it to another.

Therefore, in order to determine whether the plaintiff-in-error was deprived of his property without due

process of law, this court must inquire into the law of Pennsylvania and determine whether there is such a rule of law.

Were this not so, the highest court of a state could preclude an inquiry by this court into the constitutionality of a statute by adjudging that there was a rule of property law in the state permitting the occupation of land complained of, and that, therefore, no property had been taken from the owner who invokes the protection of the Fourteenth Amendment.

If the legislature enacted a statute authorizing property to be taken by eminent domain without compensation, could the state court shield this statute by declaring that there was a rule of property in the state that the owner held his land subject to the right of the sovereign to take it without making compensation?

If the legislature passed a statute transferring property of one person to another, could the state court uphold this by adjudging that a rule of property permitted this very thing?

This is what the party wall statute does. As construed by the state court, it takes an easement in the property of one individual and gives it to another.

Necessarily, therefore, this court must determine whether such a rule of property exists in Pennsylvania, and whether an owner might locate his wall on the land of his neighbor without the latter's consent. If the party wall statute is unconstitutional in its inception,

then there is no foundation for any rule of property law. In like manner, this court must determine whether the statute authorizes one owner to tear out the wall of his neighbor and takes away the right of the latter to any compensation for damages to his property.

For, under the Fourteenth Amendment, to take property without compensation or to give the property from one to another is a denial of due process of law.

In addition, this court must determine the limits of such rule of property.

For, obviously, the rule of property based on statutes which permit the erection of party walls two or three bricks thick along the dividing line, would not sanction the construction of a wall occupying 7½ feet of the adjoining lot, and would be no answer to the complaint that this amounted to a taking of property without due process of law.

This court has many times ruled that, in order to determine whether the obligation of a contract has been impaired, this court will inquire into the facts and, itself, construe the statute of a state in order to determine whether a contract existed and what its obligation was and whether it has been impaired.

In like manner, in deciding whether a person has been deprived of property without due process of law, this court must determine whether the party complaining had the property alleged to be taken; and if the state court declares that he had none because of a rule

of property law prevailing in the state, then this court must inquire whether there is such a rule.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238:

The Supreme Court of Michigan, construing a franchise ordinance, held that it was subject to an implied condition that the rates of fare should apply to any territory subsequently annexed to the City.

The Supreme Court of the United States held to the contrary and that the obligation of contract in the ordinance covering the annexed territory was impaired.

Mr. Justice Pitney said (249):

"It is, indeed, argued that the construction placed by the state court upon the ordinances of 1889 as contracts is not subject to the review of this court, and a declaration to this effect is cited from *Henderson Bridge Co. vs. Henderson City,* 141 U. S. 679, 689, quoted in a subsequent case of the same title in 173 U. S. 592, 602. But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligations arose from it? and (3) Has that obligation been impaired by subsequent legislation?

Houston & Texas Central R. R. Co. vs. Texas, 177 U. S. 66, 77; *St. Paul Gas Light Co. vs. St. Paul*, 181 U. S. 142, 147; *Terre Haute &c. R. R. Co. vs. Indiana*, 194 U. S. 579, 589."

In answering the contention that the complaint was not against the ordinance but against the interpretation placed on it by the court below, this court said (247):

"But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."

To the same effect, see:

Atlantic Coast Line R. Co. vs. Goldsboro, 232 U. S. 548, 556;
J. M. Perry Co. vs. Norfolk, 220 U. S. 472, 479.

Butz vs. Muscatine, 8 Wall. 575, 582-583:

In this case, contrary to the decision of the State court, this court held that a statute restricting the tax levy to one per cent. per annum, did not apply where a judgment had been recovered against the city.

Mr. Justice Swayne said:

"In all the cases brought here under the 25th

section of the Judiciary Act this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the state upon the subject. In the opinion delivered in the case of the *Jefferson Branch of the State Bank of Ohio vs. Skelley* (*1 Black*, 436), it was well asked of what value would the appellate power of this court be to the party aggrieved, if such were not the rule."

In *Stanley vs. Schwalby*, 162 U. S. 255, 278-279, Mr. Justice Gray said:

"But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon *the local law*, or upon principles of general jurisprudence."

Other decisions to the same effect are:

Norfolk & Western Ry. Co. vs. West Virginia, 236 U. S. 605, 610;

Provident Savings Life Assurance Society vs. Kentucky, 239 U. S. 103, 110;

Interstate Amusement Co. vs. Albert, 239 U. S. 560, 566;

McNulba vs. Lochridge, 141 W. S. 327, 331;

Dushane vs. Beall, 161 U. S. 513, 518;

Creswell vs. Knights of Pythias, 225 U. S. 246, 261.

XII.

THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA, RELIED UPON, WAS RENDERED AFTER THE PLAINTIFF-IN-ERROR ACQUIRED HIS PROPERTY AND HIS RIGHTS THEREIN HAD ACCRUED.

The first and only decision of the Supreme Court of Pennsylvania, holding that one owner could tear out the wall on the land of his neighbor in order to erect a party wall, was that of *Heron vs. Houston*, 217 Pa. 1, decided in 1907.

Prior to the decision in the case at bar, there had never been a declaration by the Supreme Court of Pennsylvania that the party wall statutes took away the right of an adjoining owner to compensation for the removal of his wall and for damages to his building.

The plaintiff-in-error acquired his lot and the theatre thereon in 1889 (Rec. 54).

He inherited it from his father.

The lot was conveyed to a private owner by patent of the Commonwealth a century or so ago.

When this patent issued, the rights of the grantee and his successors in the title, including the plaintiff-in-error, vested and became fixed. The Commonwealth could not alter or derogate from its unqualified grant by a later statute providing that the fee conveyed should be subject to an easement in favor of the adjoining owner.

The early party wall statutes in this state, as we shall see, merely provided for surveyors to fix the location of party walls and regulated the breadth and thickness thereof. Like the English statutes, they were police regulations of walls to be built by agreement of the parties.

They did not authorize one to occupy the adjoining lot without the owner's consent.

The Acts of 1872 and 1895 did provide that an owner might locate part of his wall on his neighbor's land.

They did not declare that he remove a wall entirely on the neighbor's or that the latter could recover no damages.

These "rules of property law," if they be such, were never provided by act of legislature and were not declared by the courts until the decision of *Heron vs. Houston,* 217 Pa. 1, in 1907.

It cannot be answered that plaintiff-in-error or his predecessors in title have aquiesced in the rule of property law announced in the court below.

For, prior to 1872, there was no statute authorizing the location of a party wall on adjoining land without the owners' consent; and prior to *Heron v. Houston,* in 1907, there had been no declaration by any court that an owner could remove a wall entirely on the adjoining lot or that the owner of the building removed could recover no compensation therefor.

Kuhn vs. Fairmont Coal Company, 215 U. S. 349:

In 1889, the plaintiff, Kuhn, sold and conveyed the coal underlying his land to a party who later conveyed it to the defendant. In 1906, the plaintiff sued, alleging the defendant had removed pillars left for support and his surface land had fallen.

In 1906, the Supreme Court of West Virginia, under a deed almost identical with plaintiff's had held that this same Fairmont Coal Company was not liable for removing the pillars.

This court declined to follow the decision of the state court, and speaking by Mr. Justice Harlan, laid down these rules:

> "2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State. 3. But where the law of the State has not been thus settled, it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is

the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued." (360)

In *Burgess vs. Seligman*, 107 U. S. 20, 33-34, Mr. Justice Bradley said:

"Where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and *transactions have been entered into*, and rights have accrued thereon under a particular state of the decisions, or *when there has been no decision, of the State tribunals*, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

Other cases to the same effect are:

Carroll County vs. Smith, 111 U. S. 556, 562;
Moore-Mansfield Company vs. Electrical Installation Company, 234 U. S. 619, 624;
Stanly County vs. Coler, 190 U. S. 437, 444.

A single decision of the highest court of the state is not conclusive evidence of the law of the state and does not establish a settled rule of law property which this court must follow:

Barber vs. Pittsburgh, Ft. Wayne & Chicago Ry. Co., 166 U. S. 83, 100;

Ryan vs. Staples, 76 Fed. 721, 727 (C. C. A. 8th Cir.);
Chicago City vs. Robbins, 2 Black, 418, 428.

XIII.

NO SETTLED RULE OF PROPERTY PERMITTING AN OWNER TO OCCUPY THE LAND OF HIS NEIGHBOR AND TEAR OUT THE WALL OF THE LATTER'S BUILDING, WITHOUT MAKING COMPENSATION, CAN BE FOUND IN THE STATUTES OR DECISIONS OF PENNSYLVANIA.

In examining the statutes and decisions hereafter summarized, we must inquire in each instance just what are the limits of the interference of private property which the statutes or decisions sanction.

A party wall statute, it will be conceded, is in derogation of the common law and an interference with the right of private property.

Such statutes, under the settled rules of construction, must be strictly construed, and may not be extended by implication to permit an interference of property not expressly provided for.

In construing the statutes and decisions and interpreting the same, we must inquire:

(1) To what extent an owner is authorized to occupy the land of his neighbor. In other words, how much land may he take for his party wall? Has any statute or decision ever said that he might take

a strip 7½ feet wide? If not, then there is no settled rule of property to that effect.

(2) Whether the statute authorizes the first owner to tear out a wall erected entirely on his neighbor's land. The statute expressly provides for the removal of existing party walls, and by the failure to make any provision for the removal of a wall entirely on the adjoining property, would seem, by implication, not to authorize the destruction of the same;

(3) Whether the statute takes away the common law right of the adjoining owner to compensation and to bring an action in trespass to recover damages for the injuries done to his property.

We especially urge this court to examine the statutes and decisions and determine the limits of any rule of property, in the light of what was done in this case.

For the existence of statutes or decisions permitting an owner to locate on the adjoining lot half of a wall, two or three bricks thick, or the ordinary type of brick wall which carries its own weight, would not authorize or justify the erection of a wall such as was built by the Rosenbaum Company on the Jackman property.

The extent of a rule of property prescribed by statutes or decisions must be determined by the same strict rules of construction as the limits of an easement, created by grant or by user, must be determined at com-

mon law. The defendant in error asserts that a right exists in derogation of the common law, and has the burden of proving that such right exists and what its limits are. This rule of property can extend only so far as the statute and the decided cases carry it.

It will not embrace any wall which an owner may build, or any trespass which he may commit, but only such as have been sanctioned by previous decision.

And the party wall must be the kind of wall that was in contemplation by the Legislature when the statute was passed and may not be a wall of any type which the ingenuity of man may later invent.

Bridge Proprietors vs. Hoboken Co., 1 Wall. 116: A statute enacted in New Jersey in 1790 incorporated a turnpike company and authorized it to build a bridge over a river, and provided that it would be unlawful for a person to erect "any other bridge" across the said river.

In 1860 a statute was passed which provided for the erection of a railroad bridge over the same river. The Court of Errors and Appeals in New Jersey construed the act of 1790 as not prohibiting the erection of a *railroad* bridge.

This court held that it was bound to review this interpretation, in order to determine whether the second statute impaired the obligation of contract embodied in the first.

In holding that the word "bridge" in the earlier statute did not include a *railroad* bridge, this court, speaking by Mr. Justice Miller, said:

> "It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. (147.) * * * It does not, therefore, follow, that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day. For instance, if a Philadelphia manufacturer had agreed with a company, seventy years ago, to furnish all the coaches which might be necessary to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? Or, if a company had then contracted with the Government to build and keep up good and sufficient roads, to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not, then, a necessary inference, that because the word bridge may now be applied by common usage to the structure of the defendants, that it was therefore the thing intended by the act of 1790." (148.)

(1) THERE NEVER HAS BEEN, PRIOR TO THE PRESENT DECISION, ANY RULE OF PROPERTY IN PENNSYLVANIA THAT WOULD JUSTIFY THE DESTRUCTION OF PROPERTY, WITHOUT COMPENSATION, IN THE ERECTION OF A PARTY WALL, BY ADVERSE PROCEEDINGS.

We give below the substance of all the Party Wall Legislation in Pennsylvania from 1721, when the first statute was passed, down to the present time.

The first statute in Pennsylvania with regard to party walls is the Act of February 24th, 1721, 1 Smith's Laws, 124. This Act relates to the City of Philadelphia and provides that no builder shall thereafter—

> "lay the foundation of any building or party wall within the said city, before they have applied themselves to the surveyors or regulators, to be appointed by the mayor and commonalty of the said city."

The second paragraph provides that surveyors or regulators—

> "upon application to them made, shall have full power and authority to enter upon the land of any person or persons, in order to set out the foundations, and regulate the walls to be built between party and party, as to the *breadth* or *thickness* thereof: Which foundation shall be laid equally upon the lands of the persons, between whom such party wall is to be made; and the first builder shall be reimbursed one moiety of the charge of such party wall, or for so much thereof as the next builder shall have occasion to make use of, before

such next builder shall any ways use or break into the said wall. The charge or value thereof to be set by the said regulators." (125)

The third paragraph provides a penalty to anyone who begins or lays the foundation of a party wall without having it viewed under the law.

This Act empowers the surveyors to "set out the foundations * * * and regulate the walls *to be built* * * * as to breadth and thickness," not to authorize the building of such walls. "The walls to be built" evidently refers to walls built by agreement.

The second Act is that of April 15th, 1782, 3 Smith's Laws, 48, which is entitled "An Act to amend and render effectual the preceding Act of 1721."

Sec. 2 provides that the regulators shall be appointed by any four of the Justices of the Peace of the city.

Sec. 3 provides that appeals from the regulators shall lie to the next court of Common Pleas to be holden for the County of Philadelphia, and provides for a jury trial which

"shall proceed therein according to the course of the common law."

Sec. 4 provides for a penalty, as in the Act of 1721, for one proceeding without a view.

Sec. 9 authorizes the regulators—

> "to enter upon any lot * * * and survey and measure the same, in order to perform the service and duty required of them by virtue of this Act."

The Act of April 22, 1794 (3 Dallas Laws of Pennsylvania, 88; 4 Carey & Bioren, 421, 15 Pa. St. at L. 161), provides that the burgesses and inhabitants of the borough of Pittsburgh shall possess all the powers, jurisdiction, authorities and privileges as those of the borough of Reading, by virtue of the Act of Sept. 12, 1783.

This latter act of September 12, 1783 (2 Dallas Laws of Pennsylvania, 124; 2 Carey & Bioren, 418; 11 St. at L. 124), incorporating the borough of Reading, provides (sec. 13):

> "That no person or persons whatsoever shall, from and after the publication of this act, lay the foundation of any party wall, or front of any building, adjoining the streets, lanes and alleys, within the said borough, before they have applied to the surveyors or regulators, to be appointed by the Burgess and Assistants of the said borough, who are hereby empowered, as often as there shall be occasion, to appoint three discreet persons to be surveyor or regulators of the said streets, lanes and alleys, so far as the same are already laid out and built upon, and of such streets, lanes and alleys, as shall hereafter from time to time be laid out and opened, by the owners of the ground within the said borough, respectively; which said persons, so to be appointed, shall direct the regulation of the

said streets, lanes and alleys, and of the footway on the sides of the streets and fronting the houses and lots in the said borough, with the width or breadth of such foot-way; and, upon application made to them, shall regulate and lay out the proper gutters, channels and conduits, for the carrying off the water; and shall and may enter upon the lands of any person or persons, in order to set out the foundations, and to regulate the walls to be built between party and party, as to the breadth and thickness thereof; which foundations shall be equally laid upon the lands of the persons between whom such party wall is to be made."

Section 14 provides:

"* * * if any person or persons shall begin or lay a foundation of any party wall or building, before the place be viewed and directed by the said regulators, or any two of them, or otherwise than the same shall be set out and directed by the said regulators, every such person or persons, as well employers as master-builders, shall forfeit and pay the sum of five pounds."

This statute, like those for Philadelphia, does not authorize one owner to occupy another's land without his consent. It regulates "walls to be built" by agreement.

The Act of March 28th, 1803, P. L. 89, which incorporates part of the Northern Liberties, adjacent to Philadelphia, makes provision in the seventeenth sec-

tion, P. L. 95, for a party wall proceeding practically identical with that in Philadelphia.

The Act of March 5th, 1804, P. L. 263, incorporating the Borough of Pittsburgh, provided in the sixth section that the town council shall have power, *inter alia*,

> "to make permanent rules relative to the foundation of buildings, party walls and fences."

No right, however, was granted to compel the erection of a party wall against the objection of one of the owners.

The Act of June 21, 1839, P. L. 370, in section 7, provided that the regulators appointed under the Act of February 24, 1871, for the city of Philadelphia and the District of the Northern Liberties, are authorized—

> "to enter upon the premises or lands of any person or persons in the said city, or district, to determine upon the sufficiency of any party wall, or walls, for the purpose of which any store, or dwelling, erecting, or to be erected, is designed and to determine and direct the builder or builders thereof, to remove any such insufficient party wall or walls, and to regulate and determine the breadth and thickness of any such wall, to be erected between party and party, according to the provisions of the second section of the said act, but at the proper charge of the applicant therefor, and under, and subject to the provisions of the said act and the several supplements thereto."

The Act of April 5th, 1849, P. L. 409, being a supplement to the Act incorporating the Borough of West Philadelphia, provides for the appointment of surveyors and regulators, and that no person shall build a party wall without making application to them and that they shall have power to regulate the breadth and thickness thereof; the general provisions are practically identical with the Philadelphia statute.

The Act of April 10th, 1849, P. L. 600, section 4, provides that the right to compensation for a party wall built shall pass to a purchaser of the land unless otherwise expressed.

The Act of 1850, P. L. 549, section 11, provides that the aforesaid Act of 1849, P. L. 409, relating to West Philadelphia—

> "shall not be construed to apply to lots on which frame houses are now erected, or may be erected previous to the application to lay such party walls, or to allow any person to enter upon the side of lots reserved as alley ways, on which lots houses have been erected."

The general borough Act of April 3, 1851, P. L. 320, provides, section two, paragraph seven, that boroughs shall have power

> "to make all needful regulations respecting the foundations and party walls of buildings and respecting vaults, cesspools, sinks, drains and partition fences."

The Act of April 16th, 1857, P. L. 222, relates to party walls in the City of Erie, and provides that no persons shall begin any party wall before they have applied themselves to the surveyors or regulators to be appointed by the mayor, etc.

The general provisions of the Act are the same as the Philadelphia act.

The Act of May 20, 1857, P. L. 590, provides that where party walls are in existence but a new building is being erected, it shall be the duty of the inspectors of buildings in the City of Philadelphia to examine the existing party walls, and if not safe to order their removal.

The Act of April 13, 1868, P. L. 965, provides that any ower of property within the City of Scranton fronting on Lackawanna Avenue shall have power to erect, build and construct foundation walls of stone and party walls of brick. Section 3 provides that the act

> "shall not be construed to authorize the removal of any wall or building now constructed within said city."

By the Act of February 18th, 1869, P. L. 188, the statute relating, *inter alia*, to party walls in West Philadelphia (see Act of April 22nd, 1850, P. L. 549,) is repealed.

The Act of 1872, P. L. 986, regulates party walls in the City of Pittsburgh. It is substantially re-enacted in Section 9 of the Act of June 7, 1895, P. L. 35.

The Act of 1873, P. L. 647, extends the party wall Act relating to the city of Erie, as set out supra, to the City of Corry in Erie County.

The Act of 1874, P. L. 230, dividing the cities of the state into three classes, provides that the cities of the third class shall have power (P. L. 244, Section 46),

> "To enter upon the land or lands, lot or lots, of any person or persons within said city, at all reasonable hours, by their duly appointed city engineer, in order to set out the foundations and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party wall is to be made, and the first builder shall be re-imbursed one moiety of the charge of such party wall, or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall or may use or break into said wall."

The Act of 1895, P. L. 135, regulates party walls in cities of the second class, and is the Act under which this case arose. Its terms have already been set out.

The borough statute of 1901, P. L. 573, provides that boroughs may make,

> "all needful regulations respecting the foundations and party walls of buildings, and respecting vaults, cesspools, sinks, drains and partition fences."

There is no provision for a compulsory proceeding.

Is it true now that there is in Pennsylvania, under those statutes and the decisions enforcing them, *a settled rule of property* that one owner may enter upon his neighbor's property, remove his wall and build a party wall, without liability for damages?

We can confidently say that there is not. The following facts clearly sustain us:

(a) THERE NEVER WAS, UNTIL THE YEAR 1907, A SINGLE PROCEEDING IN THE STATE, WHICH WE CAN FIND, WHERE ONE PARTY SOUGHT TO COMPEL THE CONSTRUCTION OF A PARTY WALL UNDER THOSE STATUTES AGAINST THE OBJECTION OF THE ADJOINING OWNER.

Heron vs. Houston, 217 Pa., 1, is the first case in the books where one party sought to compel the erection of a new party wall against his neighbor's protest.

(b) THERE NEVER WAS, UNTIL THAT SAME CASE, A SINGLE DECISION IN THE STATE WHERE IT WAS SOUGHT TO TEAR DOWN AN EXISTING WALL, BUILT WHOLLY ON ONE MAN'S PROPERTY, IN ORDER TO ERECT A PARTY WALL, AGAINST THE PROTEST OF THE ADJOINING OWNER.

(c) THE QUESTION OF DAMAGES TO THE ADJOINING OWNER WAS NEVER DECIDED IN THE STATE PRIOR TO THE DECISION IN THIS CASE.

In *Buck vs. Weeks,* 194 Pa., 522, and again in *Lennig vs. Dougherty,* 45 Pa. Sup., 198, the question arose, but it related to negligent repairs made to an existing *party* wall.

And neither of those cases decided the question of liability for the damages claimed. The court below so finds. (Rec. 122.)

In no case in Pennsylvania was the question of the adjoining owner's right to damages, under an adverse proceeding for the construction of a party wall, ever raised, discussed or decided prior to the present case.

We give below all of the cases decided in Pennsylvania which have a direct bearing upon the question of the right to erect a party wall. Of course, there are innumerable decisions in Pennsylvania, as there are in all States, on party walls, touching the subject of construction, materials, openings in walls, repairs, etc., but none of those cases touch the question of legislative power.

Evans vs. Jayne, 23 Pa., 34 (1854), related to the removal of an old party wall condemned by the City Regulator of Philadelphia, as unsafe. The only question was whether his opinion was final, or whether an appeal could be had to the Courts.

Roberts vs. Bye, 30 Pa., 375 (1858), dealt entirely with the question of the ownership of a party wall erected by agreement.

Vollmer's Appeal, 61 Pa., 118 (1868): This much-cited case was a suit to restrain the builder of a party wall, erected under an agreement, from placing windows in the wall. There was nothing whatsoever in the case to be decided regarding party wall legislation, except the provision that those walls must not contain windows.

Appeal of Western National Bank, 102 Pa., 171 (1883): This case is also much cited, but an examination of it shows that the only question to be decided was whether a certain old wall, built long before under an agreement, was or was not a party wall. One party claimed that it was and that he had the right to strengthen it and build it higher. The other party claimed that it was not a party wall. Pennsylvania legislation had nothing whatsoever to do with that case.

Hoffstot vs. Voight, 146 Pa., 632 (1891): This case decides only that where one party tears down an existing wall and builds a new one in its place, the adjoining owner cannot be compelled to pay part of the costs until he makes a new use of the wall.

The question of the right to erect a wall, the right to enter upon another man's property, adversely, in order to do it, the right to destroy or in any way affect his property in the erection of that wall, was in no sense in the case. It related only to the rebuilding of an existing party wall,—a proceeding that could have arisen and been decided in the same way in every jurisdiction in the Union, entirely apart from legislative enactment on the question.

Buck vs. Weeks, 194 Pa., 522 (1900): In this case the building inspector had condemned an existing party wall and ordered it taken down, and the suit was for damages for the alleged negligent acts of the adjoining owner in so removing it.

(2) THE CONSTRUCTION GIVEN TO THE STATUTE BY THE COURT BELOW IS CONTRARY TO SETTLED RULES OF INPRETATIONS AND NOT ONE WHICH WOULD BE REASONABLY ANTICIPATED BY THE OWNERS OF PROPERTY; THEREFORE, PRIOR TO THAT DECISION, NO WELL RECOGNIZED RULE OF PROPERTY COULD EXIST IN ACCORDANCE THEREWITH.

The rule of property must have been a *settled rule.*

It must have been a *known rule.*

It must have been a rule which the owners of property ought to have learned and taken into account in the purchase and improvement of their properties.

We have shown that there never was such a rule.

If it did exist, it would be possible to point to some decision *deciding that rule and applying it.*

We say that not only was that rule not clearly deducible from the statute, but that the proper construction of the statute does not lead to the conclusion of the Court below, forbidding us our right to damages; therefore, we say that owners of property are not to be charged with prior knowledge of the construction put upon that statute by the Court below.

(a) THE STATUTORY RIGHT TO BUILD A PARTY WALL PARTLY UPON ANOTHER MAN'S LAND, IS IN DEROGATION OF COMMON-LAW RIGHTS AND IS TO BE STRICTLY CONSTRUED.

In *Heron vs. Houston*, 217 Pa., 1, 3, the Court held that the laws permitting such walls to be erected are,—

> "an interference with that exclusive enjoyment ordinarily incident to ownership of land and are therefore to be strictly construed: *Hoffstot vs. Voight*, 146 Pa., 632."

In *Corcoran vs. Nailor*, 6 Mackey (D. C.) 580, 583, it is held:

> "This servitude imposed *in invitum* is to be construed with the utmost strictness."

See also:

> *Duncan vs. Labourisse*, 9 La. Ann., 49;
> *McIntosh vs. Duncan*, 12 La. Ann., 785.

The statutory right given to the adjoining owner, therefore, is to be strictly construed as an infringement upon common-law rights.

(b) STATUTES IN DEROGATION OF COMMON-LAW RIGHTS ARE TO BE EXTENDED NO FURTHER THAN THE VERY NECESSITIES OF THE CASE REQUIRE; I. E., EVERY COMMON-LAW RIGHT IS TO REMAIN WHICH CAN REMAIN WITHOUT DEFEATING THE PURPOSE OF THE STATUTE.

The courts universally hold that a statute in derogation of common-law rights is to be so construed *that no common-law right shall fall which can remain* without defeating the statutory rights given.

As expressed in

Texas & Pacific Railway vs. Abilene Cotton Oil Co., 204 U. S., 426, 436:

"* * * a statute will not be construed as taking away a common-law right existing at the date of its enactment, *unless that result is imperatively required;* that is to say, unless it be found that the pre-existing right is *so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy;* in other words, *render its provisions nugatory."* (Italics are ours.)

In other words, if the pre-existing common-law right can stand *with the statute,* that right is not to be construed to have been destroyed *by the statute.*

The courts of Pennsylvania have uniformly adhered to the same principle of construction.

In *Keim vs. Reading,* 32 Penna. Super., 613, the Court said (620):

"Statutes are not presumed to make any change in the rules and principles of the common-law beyond what is expressed in their provisions, or fairly implied in them, in order to give them full operation; rules of the common-law are not to be changed by doubtful implication: Endlich on Interpretation of Statutes, Sec. 127. Indeed the rule has been more broadly stated as follows: 'In all doubtful matters and where the expression is in

general terms, statutes are to receive such construction as may be agreeable to the rules of the common law in cases of that nature, *for statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares.*" (Italics are ours.)

Foster vs. Commonwealth, 8 W. & S. 77.

IF IT BE CONCEDED (WHICH WE DENY) THAT THE STATUTES GIVE AN OWNER AN UNASSAILABLE RIGHT TO ENTER UPON AN ADJOINING LOT TO ERECT A PARTY WALL, STILL THESE STATUTES DO NOT DENY THE ADJOINING OWNER THE RIGHT TO COMPENSATION.

The above decisions unanimously hold that he has been deprived of every right which would prevent the operation of the statute, *and of no other right.*

At common law, the adjoining owner had the dual right—

(a) To forbid any entry whatsoever upon his property;

(b) To recover any actual damages sustained by him because of such entry.

The distinction between these two rights is preserved in all the acts relating to eminent domain, which give the right to enter, but require the payment of damages for loss sustained.

Concede, for the sake of argument, that the first of these rights has been lost under the party wall statute

because

the owner's common-law right to hold his property secure against any entry of his neighbor upon it *cannot exist with the statute.*

Still the other right—that of damages for any injuries sustained—would not be affected.

The two rights—

(1) Of the one to enter and build, and

(2) Of the other to have actual damages sustained—

can both stand.

Is not that clearly true?

The two rights *can* both exist, and, therefore, under the authorities, the common-law right *must* remain.

As said in *Texas & Pacific Railway vs. Abilene Cotton Oil Co., supra,* the common-law right will not fall—

"unless that result *is imperatively required* * * * unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect *deprive the subsequent statute of its efficacy;* in other words, render its provisions nugatory." (436)

And as said in *Borland vs. Nichols,* 12 Pa., 38, 42, *supra*—

> "It is not to be presumed, * * * that the legislature intended to make any innovation upon the common law, *further than the case absolutely required.*"

It is not

"imperatively required"

that the right of the plaintiff-in-error to damages shall fail in order to give this statute effect.

To give him his damages *would not*

"deprive the subsequent statute of its efficacy,"

or

"render its provisions nugatory."

But to refuse him his damages would push this statute

"further than the case absolutely required."

Therefore, under the above authorities, since they *can* both stand, they *must* both stand. The great common-law right to be secure in the possession and enjoyment of one's own property will not be disturbed further than is absolutely required in order to give effect to this statute.

The act *does not say* that our damages shall not be paid. It says not a word that requires this Court to hold that we are barred from a recovery.

Before the Court can hold that, it must read into the act some such words as—

"and no damages shall be paid for injuries necessarily caused to the adjoining property."

A common-law right is not to be taken away, say the above authorities, except by—

(1) *Express words,*
(and there are no express words here); or,

(2) *Necessary implication.*

Why should the Court read into the statute that no damages shall be recovered? *The Legislature did not put those words in.* Would it not have inserted them if it thought proper to destroy our right to damages?

As said by Judge Rice in *Keim vs. Reading,* 32 Pa. Super., 613, *supra,* where it was claimed that a common-law right had been destroyed—

"If the legislature had had that design, they would have expressed it in the act." (620)

Why should the Court read that new clause into the act?

Is it necessary to enable the defendant-in-error to build his wall?

Certainly not; *he can build his wall and pay damages, just the same as a railroad can build its tracks and pay damages.*

We do not claim that the act *has given us a right to damages. We always had that right.* It was our right under the comomn law.

All we say is that the statute *has not taken away our right to damages.*

Not that the statute *has given,* but that it *has not taken away.*

On the other hand, the defendant-in-error says that the act *has given* him relief from damages.

It is claiming from the statute not a *negative* but a *positive* result; not that the statute *has failed to place a liability upon him,* but *that it has actually taken away a liability* which previously existed.

The burden was, therefore, heavily upon it to show the *express words* of the statute, or the *necessary implication,* that it is now allowed to destroy his neighbor's property without liability for damages therefor.

There are no express words and no implication that is necessary or reasonable. There has therefore, been no such rule of law, and the interpretation is so contrary to settled principles that an owner would not have reasonably anticipated it.

XIV.

THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA SHOULD BE REVERSED, WITH DIRECTIONS TO ENTER JUDGMENT ON THE VERDICT FOUND BY THE JURY IN FAVOR OF THE PLAINTIFF-IN-ERROR.

Respectfully submitted,

H. F. STAMBAUGH,
ERNEST C. IRWIN,
JOHN M. FREEMAN.

Attorneys for Plaintiff-in-Error.

APPENDIX.

Extracts Relating to Party Walls from the Pennsylvania Act of June 7, 1895, P. L., 135.

"AN ACT

Regulating the construction, maintenance, alteration and inspection of buildings and party walls in cities of the second class.

SECTION 1. Be it enacted, etc., That there shall be in the cities of the second class a bureau of building inspection attached to the department of public safety and under the supervision and control of the director of said department.

* * * * * * *

SECTION 9. Any person or persons who may be now erecting or may desire hereafter to erect any house or building in such cities, and who may desire to erect therewith a party wall to be used in common by the person or persons erecting, and the owner or owners of the adjoining lot may apply to the said Bureau of Building Inspection of such cities signifying his or their intention to erect a party wall, and describing the location of his or their lot and the lot adjoining, partly upon which said party wall is to be erected, with the plans and specifications of the said proposed wall and the materials of which the same is to be built, whereupon it shall be the duty of the said Bureau of Building Inspection to appoint a time at

which the Superintendent thereof, or some person by him authorized, will meet the party or parties upon the premises, not more than five days thereafter, of which application, a copy, with notice of the time so appointed, shall be served by the said Bureau of Building Inspection upon the occupant of said lot at least three days before the time so fixed. If said lot is unoccupied the said notice shall be served upon the owner or one of the owners of the same, if he reside within the county in which such city is situate, at least forty-eight hours before the time fixed. Service thereof may be made either personally or by leaving a copy of the notice at the residence of the owner or occupant. If there be no owner or occupant resident in the said county, or if such owner be unknown such notice shall be posted upon the premises and shall be equivalent to a service. At the time appointed, the Superintendent of the said bureau, or some suitable person by him appointed, shall have the line dividing said lot properly surveyed by the bureau of engineering and surveys of such city, and the land upon which the said party wall is to be erected, with the breadth and length of the same, and which wall shall be equally one-half upon the land of each of the adjoining owners, unless the adjoining owners shall object that said wall as proposed is thicker than necessary for the purpose of any ordinary building. If such objection shall be made, then the said Superintendent, or the person by him appointed, shall determine how much of said wall shall be placed upon each of said lots and shall decide the same within forty-eight hours after the said objection has been made, and his decision shall be final and conclusive upon all parties. The said party wall shall be erected by the party first build-

ing at his own cost, including the cost of the survey, plans and specifications herein required, and when fully completed the cost of the same shall be ascertained by the said Superintendent, or his agent, who shall, at the same time, determine the proportion thereof to be paid by the adjoining owner of which he shall give a certificate to the builder, which certificate shall be conclusive of all matters therein contained: Provided, That at least forty-eight hours' notice shall be given by said Superintendent, or his agent, to the owner or owners or occupant of said adjoining lot before said certificate shall be given to the builder of the time and place when he may be heard with reference to the same. The owner or owners of said adjoining lot, his or their heirs, assigns or lessees, shall not use said party wall by building into or against it, or by in any way using it for any new building or structure, until he or they shall have paid to the first builder or builders, his heirs or assigns, the proportion of the cost of said wall as fixed by said Superintendent, or his agent, or of so much of it as he may desire to use. Whenever any party wall shall become impaired in whole or in part, or whenever the same shall in whole or in part be unfit or unsafe for the purpose of erecting a new building or buildings upon the adjoining lot and the owner or owners of said wall, or any one of the same, shall desire to have said wall repaired or shall desire, in whole or in part, to tear down said wall and have erected a new party wall for the purpose of then erecting a new building, any one of the owners of said wall may apply, in writing, to the Bureau of Building Inspection, signifying to such bureau his or their desire in reference to said wall, and it shall thereupon be the duty of said Superintendent,

or his authorized agent, to examine the same, having given notice as prescribed in this section when said examination shall take place, the said Superintendent, or his agent, shall, within six days after said application has been made, decide what, if any, alteration or repairs shall be made in said walls and whether it is necessary that the whole or any part, and if so, what part of said party wall shall be torn down and a new one erected for the purpose of new buildings which either party may then desire to erect, which decision, in writing, shall be final and conclusive upon all parties. The said Superintendent, or his agent, shall also determine in what proportion the cost of repairing or of tearing down part or the whole of the old wall and the erection of part or whole of the new wall shall be borne by the respective owners of said lots, which decision shall also be in writing and shall be conclusive upon all parties. It shall be the duty of any court of common pleas of the county within which such city is situate, on application made by the proper parties in interest, to enjoin and restrain any subsequent builder on the adjoining lot from cutting or breaking into or using said new party wall or any part thereof, until he or they shall have first paid to the first builder, his heirs or assigns, his or their fair proportion of the cost of said party wall or of the cost of, in whole or in part, tearing down the old wall, or, in whole or in part, of erecting a new party wall as said proportion shall have been estimated by the said Superintendent or his lawful agent of the said Bureau of Building Inspection. For the purpose of performing the duties enjoined by this section the said Superintendent and the proper officers of the

said Bureau of Building Inspection and their assistants may, at all reasonable hours enter upon any of the lands within said city for the purpose of performing the duties herein required. All of the necessary expense incurred in and about the performance of the duties named in this section, including the preparation of plans and specifications, survey and draughts, shall be borne and paid by the person or persons at whose instance and request the work shall be done, which expense may be computed in determining the final cost of such party wall. All sums of money so paid shall be returned to the city treasurer of such city by the public officer receiving the same. In all conveyances of houses and buildings the right to and compensation for the party wall built therewith shall be taken to have passed to the purchasers, unless otherwise expressed and reserved, and the owner of the house, for the time being, shall have all the remedies in respect to such party wall as he might have in relation to the house to which it is attached. All party walls authorized hereby shall be built solidly from the cellar bottom to the top of the fire wall."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1[redacted]1922

No. [redacted]2[redacted]8

EDWARD F. JACKMAN, Plaintiff in Error,

vs.

THE ROSENBAUM COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF DEFENDANT IN ERROR.

A. LEO. WEIL,
J. SMITH CHRISTY,
Attorneys for Defendant in Error.

James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1919.

No. 345

EDWARD F. JACKMAN, Plaintiff in Error,

vs.

THE ROSENBAUM COMPANY, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error presents now, for adjudication by this court, questions not raised or presented for adjudication in the courts of Pennsylvania, either in the court of *nisi prius* or in the Supreme Court.

The present argument of the plaintiff in error, to this court, is based upon the contention that in building a party wall under the laws of Pennsylvania the property of plaintiff in error was appropriated without due process of law and without compensation, in violation of the Fourteenth Amendment. The declaration or statement of claim in the court of original jurisdiction was solely for consequential damages for tearing down an old wall for the purpose of erecting the party wall. The damages claimed were for restoring his building, its equipment and furnishings, and for loss of rent during the time it was rendered unfit for occupancy.

As was said by Mr. Justice Moschzisker, rendering the opinion of the Supreme Court of Pennsylvania in this case, (Transcript of Record, pp. 111, 112):

> "Plaintiff sued in trespass to recover damages for alleged injuries to the Duquesne Theater, in the City of Pittsburgh, and other losses claimed to have been suffered by him as a consequence of the removal, by defendant, of an old wall, belonging to that building, which ran along, but did not extend over, the division line between the properties of plaintiff and defendant, the latter requiring the space occupied by the old wall for the purpose of erecting a party wall for a large department store in course of construction upon its lot. Defendant originally contemplated incorporating the old wall into the new one; but the city authorities decided that the former was not sufficiently substantial for that purpose, and ordered its removal, which was done by the contractor in charge of the erection of defendant's building. Plaintiff claimed consequential damages only; he did not ask payment for the wall that was taken down, nor for his ground occupied by the new wall, nor compensation for material taken and applied to the purposes of the latter. He sought to recover only for loss of rent and the cost of repairing and refitting the theater.
>
> * * * * *
>
> The party wall proceedings were in accord with the provisions of the Act of June 7, 1895, P. L. 135, and plaintiff neither alleged nor endeavored to prove defendants had not strictly complied with the law; but claimed to recover upon the theory that while defendant had the legal right to erect the new wall, and, if necessary, to cause the removal of all obstructions standing in its way, yet in so doing it

became liable as an insurer for all damages, direct or consequential, caused by the work in question, whether through negligence or otherwise. Plaintiff also claimed in the court below, and contends here, that, if necessary to prove negligence, the evidence is sufficient to that end; and, further, that the defense of independent contractor is not applicable to a case of this character.

On the other hand, defendant contends that, in all matters concerned, it acted strictly within its legal rights, without negligence; and, further, if any negligence existed, either in the doing of the work in question or through delay in its completion, this must be attributed to and charged against the contractor, who at all times proceeded without supervision or interference on part of defendant."

The trial court, as well as the Supreme Court, having held that no negligence or want of due care and diligence were proven, and that, even if there was evidence of such facts, the work having been done by an independent contractor, no liability existed on the part of defendant, these questions cannot be considered by this court. The decision of these facts by the Supreme Court of Pennsylvania is conclusive on this court.

The case of the plaintiff in error in this court, therefore, must stand upon his claim for consequential damages resulting from the exercise by defendant in error of a right given by statute, and with which there was strict compliance. Consequential damage, under such circumstances, is not a property right or vested interest protected by the Fourteenth Amendment to the Constitution of the United States, except only when the State has granted such right to such damage, either by its organic law or by its statutes.

The Party Wall Law of Pennsylvania is a settled rule of property. As was said by the Supreme Court of Pennsylvania in this case, speaking of the Party Wall Law, (Transcript of Record, p. 119):

> "Although the system may have originated in English statutes, it (as stated by our brother Stewart in *Heron v. Houston, supra*) has 'become,' by enactment and reenactment, acceptance and long acquiescence, a 'settled rule of property,' where applicable in this state; moreover, it was so long before any of the rights now insisted upon by plaintiff became fixed or established; and, thereunder, such an act of entry as here complained of against defendant was entirely lawful,—which historical fact should be taken into account in considering plaintiff's several propositions."

Every adjoiner holds his property subject to the easement of occupation for party wall purposes of the adjoining land owner, or, as stated by the Supreme Court of Pennsylvania in the instant case, (Transcript of Record, pp. 117, 118):

> " * * * The strip of land, the middle of which constitutes the dividing line between plaintiff's and defendants' properties, was dedicated, in theory of law, for party wall use; and, when so desired by either of the respective owners, neither could, without the consent of the other, prevent its occupation for that purpose.
>
> As declared in *Heron v. Houston* (No. 1), 217 Pa. 1, 4, citing Western National Bank's Appeal, 102 Pa. 171, 'this right (of easement) cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom'; for the right to

construct a party wall on the ground thus occupied by him 'arises out of a provision of the law to which all owners of real property * * * are subject, and in reference to which all conveyances * * * must be supposed to have been made and accepted': *Barns vs. Wilson,* 116 Pa. 303, 307."

Plaintiff in error, as plaintiff in the courts of Pennsylvania, based his claim "to recover upon the theory that while defendant had the legal right to erect the new wall, and, if necessary, to cause the removal of all obstructions standing in its way, yet in so doing it became liable as an insurer for all damages, direct or consequential, caused by the work in question, whether through negligence or otherwise."

This contention involved solely the construction of the Pennsylvania statute on party walls, and the construction thereof given after careful consideration by the Supreme Court of the State will not be disturbed by this court.

Certain misconceptions of fact appear throughout the argument of plaintiff in error, from which he seeks to make it appear that he suffered great hardship from the enforcement of this Party Wall Law, was deprived of opportunity for hearing, and that his property was, without legal procedure, arbitrarily and ruthlessly taken by defendant in error.

It may serve a useful purpose to state the facts at this time, as shown by the record, instead of answering the argument of plaintiff in error in detail where these facts are involved. The statute in controversy, the party wall law relating to cities of the second class, (Act of June 7, 1895, P. L. 139, General Building Code)

is a comprehensive enactment providing for the erection of buildings, the inspection of the plans by the city authorities, &c. It creates a Bureau of Building Inspection, with superintendent, clerks and inspectors. It is printed in full in another part of this brief. This law provides for hearings after notice, appeals, &c. Sections 9, 15, 20 and 21 refer particularly to party walls.

Whether or not this legislation provides the best machinery that can be devised for accomplishing the purposes designed, is not for the courts to decide.

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short the legislative discretion within its prescribed limits should be exercised in that particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

C., B. & Q. R. R. vs. McGuire, 219 U. S. 549.

See also *Cusack Co. vs. Chicago,* 242 U. S. 527; *Powell vs. Pennsylvania,* 127 U. S. 678; *McLean vs. Arkansas,* 211 U. S. 539; *Rast vs. Van Deman & Lewis Co.,* 240 U. S. 342.

It may be true, as plaintiff in error argues, that the present Building Code, and especially the provisions relating to party walls, need some changes to adapt the same to present conditions in our great cities, with their sky-scrapers, etc., or it may be that more elaborate provisions should be made for notices and hearings and the consideration of plans before party walls are constructed. However this may be, these are arguments to be addressed to the legislature and not

to the courts. The same objections might apply to the power vested in the Bureau of Building Inspection as to the plans and specifications for all buildings without reference to whether or not a party wall is involved.

Counsel for defendant in error find it unnecessary to defend the present law, or to make any apologies therefor. The analysis thereof in another part of this brief shows this law to have been framed with the utmost care and consummate skill, providing for examinations, hearings and appeals by and before experts. It has worked and is working successfully and satisfactorily to the public, and the reports of our courts show little or no complaint against its operation in the particulars inveighed against by the plaintiff in error.

However, as stated, the best answer to a great deal of the argument of the plaintiff in error throughout his brief of argument, in criticism of this Building Code, is that the same is addressed to the wrong forum, and should be addressed to the legislature of Pennsylvania rather than to the Supreme Court of the United States. The legislature has power to amend. The Supreme Court has no such power.

Pursuant to this party wall statute of Pennsylvania The Rosenbaum Company proceeded to construct a party wall between the property of plaintiff in error and its own. The plans originally contemplated using the wall of the plaintiff in error by incorporating the same into the new wall, furnishing, however, for the new wall a substantial foundation in accordance with the Building Code. When The Rosenbaum Company made application to the Bureau of Building Inspection and presented its plans, the Superintendent of the Bureau, after notice to all parties, proceeded to inspect

the property. The wall of the theater of plaintiff in error was not built originally for a theater, but for a livery stable. When the old wall of the old building adjoining this theater was torn down the examination made by the Bureau of Building Inspection of the city showed this wall of the theater to be dangerous and unsafe. The Bureau accordingly refused to approve the plans whereby the theater wall was to be incorporated into this party wall, and condemned the theater wall and ordered its removal.

Let it be noted that this wall, so ordered removed by the Bureau of Building Inspection of the city of Pittsburgh, is the very wall about which so much complaint is made, and for the removal of which damages are claimed from defendant in error. Its removal was necessary and was ordered without regard to whether or not a party wall was to be built. Its unsafe condition might not have been disclosed at that time if the defendant in error had not removed the wall on its own property, which abutted upon the theater wall.

The Rosenbaum Company then prepared new plans, providing for an entirely new party wall, and accordingly the theater wall was removed and a new party wall built 13 inches thick, the center line whereof was on the division line between the Jackman property and the Rosenbaum property. The soil at this place is of alluvial formation. The rock or compact gravel formation is about 50 feet below the curb level. Due to the percolation of water from the rivers (Allegheny and Monongahela) it was not practicable to excavate to this gravel formation. Accordingly piles were driven and steel caissons sunk to this rock or gravel strata in order to obtain a secure foundation. These caissons necessarily were wider than the wall they

were designed to support. They were accordingly built, following the engineering and statutory requirements of the Act of 1895, (the Building Code above referred to), 13 feet in diameter and extended from the rock formation to a point 33 feet below the curb level. At this point the 13-inch wall began, that is, 33 feet below the surface. These caissons are what are referred to by the plaintiff in error as the occupation by defendant in error of 7½ feet of his land. They supported the theater wall as well as the Rosenbaum wall. They supported the party wall. They were as necessary to the building of plaintiff in error as to the building of defendant in error.

Plaintiff in error made no objection whatever to this procedure, the tearing down of his old wall, the sinking of the caissons, the method of building the foundation, or the manner of constructing the wall. The declaration filed in the court of original jurisdiction, the evidence offered on the trial, or the argument in the Supreme Court of the State, raised no question whatever as to the propriety or legality of any of these proceedings. As was found by the trial court and affirmed by the Supreme Court of the State, there was no undue delay or negligence in the prosecution of this work and no unnecessary damage inflicted upon the plaintiff in error.

As shown by *Jackman vs. Davis Enterprises Co.*, 256 Pa. 215, plaintiff in error sued for and collected rent from his tenant for the premises, notwithstanding the untenantable character of his theater, rendered by the removal of this wall, the trial court and Supreme Court of the State holding that the acts of the city and of the adjoining owner (defendant in error) were not an eviction.

Under the pleadings, the facts as presented, and the admissions as made by plaintiff in error in the courts of Pennsylvania, he made claim to nothing but consequential damages for the removal of this old, condemned wall of his theater.

As stated by Mr. Justice Moschzisker:

> "Plaintiff claimed consequential damages only. He did not ask payment for the wall that was taken down nor for his ground occupied by the new wall nor compensation for material taken and applied to the purposes of the latter. He sought to recover only the loss of rent and the cost of repairing and refitting the theater."

Defendant in error will hereinafter undertake to show that the Party Wall Law of Pennsylvania was a proper exercise of the police power; that it has long since become a settled rule of real property and an incident to its ownership, all land owners holding their titles subject to this right or easement, the respective properties being respectively servient and dominant thereto; that none of the party wall statutes applying to the city of Pittsburgh provide for compensation, and no compensation was contemplated; that the erection of a party wall is the exercise of a legal right and is not a trespass.

Defendant in error will also undertake to show that the contention of plaintiff in error, that he cannot be deprived of his damages resulting from the exercise of the right to build a party wall, on the grounds that any legislation which did not provide for these damages would be unconstitutional, misapprehends the basis of the constitutional restriction. He confounds the laws

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which take property under the right of eminent domain with the laws which provide for the taking of property under the police power. In the former case the property is actually appropriated; in the other case there is no appropriation of title and no further interference than is essential for the protection of the public.

The further discussion of this case will be under the following headings:

I.

UNDER THE ISSUES PRESENTED BY THE PLEADINGS AND BY THE ADJUDICATION IN THE PENNSYLVANIA COURTS, THE DECISION OF THOSE COURTS IS CONCLUSIVE ON THIS COURT, THE QUESTION NOW PRESENTED TO THIS COURT NOT HAVING BEEN RAISED IN THE COURTS OF PENNSYLVANIA.

II.

THE DENIAL OF THE CLAIM FOR CONSEQUENTIAL DAMAGES IN THIS CASE IS NOT THE TAKING OF PROPERTY WITHOUT COMPENSATION, OR WITHOUT DUE PROCESS, IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

THE PARTY WALL LAW OF PENNSYLVANIA, HAVING BECOME A RIGHT OF PROPERTY UNDER THE LAWS OF PENNSYLVANIA, ALL TITLES ARE ACQUIRED SUBJECT TO THE RIGHT OR EASEMENT OF THE ADJOINING

OWNERS WHO HOLD THEIR PROPERTY RESPECTIVELY SERVIENT AND DOMINANT THERETO, AND THE ADJUDICATION OF THESE RIGHTS OF PROPERTY, AND THE CONSTRUCTION OF SAID STATUTE, BY THE SUPREME COURT OF PENNSYLVANIA, IS CONCLUSIVE UPON THIS COURT.

IV.

THE PARTY WALL LAW OF PENNSYLVANIA: ITS EXISTENCE FOR OVER TWO HUNDRED YEARS: ITS ENACTMENT AND ENFORCEMENT BEING A PROPER EXERCISE OF THE POLICE POWER OF THE STATE, COMPLIANCE THEREWITH IS NOT PROHIBITED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

All of the questions above outlined, with the exception of those which relate to the jurisdiction of this court, are so ably and fully discussed by Mr. Justice Moschzisker, delivering the opinion of the Supreme Court of Pennsylvania in this case, (Transcript of Record, page 111 *et seq;* 263 Pa. 158), that it seems like a work of supererogation to add anything thereto, but because the argument of the plaintiff in error has so misconstrued the facts and confused the questions presented to and decided by the courts of Pennsylvania, the following argument—perhaps much fuller than necessary—will be presented.

I.

UNDER THE ISSUES PRESENTED BY THE PLEADINGS AND BY THE ADJUDICATION IN THE PENNSYLVANIA COURTS, THE DECISION OF THOSE COURTS IS CONCLUSIVE ON THIS COURT, THE QUESTION NOW PRESENTED TO THIS COURT NOT HAVING BEEN RAISED IN THE COURTS OF PENNSYLVANIA.

No question which was not presented to or decided by the Pennsylvania courts can be raised on this writ of error in this court. As already stated, a reversal is asked upon altogether different grounds and for an altogether different reason than that submitted to the trial court, decided by it, and affirmed by the Supreme Court of the State. The declaration or statement of claim filed by the plaintiff, Jackman, in the Court of Common Pleas of Allegheny County, (Transcript of Record, page 4), demanded consequential damages from the defendant, The Rosenbaum Company, for delay in completing the party wall and failure to restore the building and furnishings to as good condition as when the work of erecting the party wall began. Nothing else was claimed; no payment for the wall torn down; no payment for his ground occupied by the new wall; no payment for the sinking of the caissons to hold the foundation; no payment for anything but the consequential damages in the loss of rental and the restoration of the theater. It is important that this should incontrovertibly appear to this Court. Accordingly the relevant parts of the declaration are given below:

> "That the defendant on or about the 6th day of June, 1914, preparatory to the erection of said party wall, entered upon the plaintiff's premises and commenced the removal of the east wall of the said Duquesne Theater building. * * *

"That the said defendant during the removal of said east wall and the construction of said party wall, wrongfully, unlawfully and negligently delayed the work thereon and wrongfully, unlawfully and negligently failed and refused to provide an adequate force of workmen for the prompt completion of said work and failed to adopt the requisite methods necessary to secure the prompt completion of said work. * * *

"That the said defendant in the removal of the east wall of said theater building and the construction of said party wall rendered said theater building untenantable and wholly unsuitable for use for any purpose and particularly for theatrical purposes and damaged said building and its furnishings, equipment and decorations, and particularly destroyed the electric wiring and heating systems thereof. * * * Defendant also after said wall was erected to the height of the theater building negligently and unlawfully failed and refused to restore said building and its said furnishings, equipment, decorations and its electric wiring and heating systems to as good condition as existed when said work was commenced or to make said building suitable for use and wholly abandoned the same, whereupon the plaintiff was compelled at his own expense to restore said building and its equipment and furnishings to their former condition and to make it suitable for use, and expended therefor $19,972.78.

* * * * *

"Plaintiff avers that had said building been in suitable condition for occupancy on or about the first of September, 1914, which defendant well knew, as aforesaid, was the usual and customary period

for the beginning of the annual theatrical season, plaintiff could have leased said premises for theatrical purposes for said season ending September 1st, 1915, at a rental of not less than $40,000 per year, with the additional cost for watchman's service amounting to $1560.00 per year. That owing to the negligent acts and delays of the said defendant in failing to prosecute and complete said work with the requisite diligence and care, it was impossible for the plaintiff to rent said building for said theatrical season of 1914 and '15, or any part thereof, up to the present time, and defendant has thereby caused plaintiff to lose the rental for said premises for said theatrical season.

"That it was the duty of said defendant to use and exercise not only ordinary diligence and care in the removal of said east wall of the Duquesne Theater building and in the construction of said party wall, but to use every reasonable precaution that care and skill might suggest in the execution of said work so as to protect the plaintiff from all avoidable injury, and particularly to the end that plaintiff should not be deprived of the use of his said property for any longer period of time than was reasonably necessary, in the exercise of such precautions, diligence and care, for the removal of said wall and the construction of said party wall, but the defendant wrongfully and unlawfully neglected and failed to exercise requisite diligence and care in both the removal of said east wall of the Duquesne Theater and the construction of said party wall.

"It was furthermore the duty of said defendant to restore said Duquesne Theater building, after the completion of said party wall, to the condition

that existed and in which it found it when said work was commenced or to restore it to a condition equally as good and as suitable for the purpose for which it was adapted and used as that which existed when said work was commenced, which duty defendant wholly neglected, failed and refused to perform.

"Whereby defendant has damaged the plaintiff in the sum of seventy-five thousand ($75,000.00) dollars, for the recovery of which this suit is brought."

The evidence was offered in the trial court on these issues. No evidence was offered as to the value of the land occupied, or on any other issue.

The trial judge, in his opinion, (Transcript of Record, p. 97), says:

"This action is instituted to recover damages for alleged injuries to the Duquesne Theater, owned by plaintiff, and situate on Penn Avenue, Pittsburgh, Pa., during the removal by defendant of an old wall on plaintiff's property, which was condemned by the city authorities and ordered removed, so that the erection of a party wall, under and by virtue of the provisions of the Act of Assembly of Pennsylvania, approved June 7, 1895, P. L. 135, could be accomplished. The statement does not allege that the provisions of said law were not strictly complied with by defendant, nor was there any evidence to that effect. It was, indeed, conceded by plaintiff that the same had been strictly complied with."

and again, (Transcript of Record, p. 101):

> "Plaintiff, in his statement and on trial, planted his case on the theory that whether the injuries arose from the negligent operation of the work done, or whether they were the direct, incidental and consequential result of the exercise of the right by defendant to build said party wall under the statute, that in either case he had the legal right to recover damages. This theory was not entertained by us at the trial. We held then, as we now do, that the plaintiff could only recover for injuries resulting from negligence or want of due diligence in the execution of the work. Plaintiff accordingly proceeded to submit testimony on the question of negligence, at the close of which the defendant moved for a non-suit on the grounds, (1) That no evidence of negligence had been submitted; (2) that even though there had been, there was no evidence whatever to distinguish the character and the amount of damages resulting from the lawful exercise of the right and those resulting from negligence or want of due diligence; and (3) because the work had been done by an independent contractor, who alone was liable. * * * A careful review of the entire record clearly discloses that there was no evidence of negligence or delay. Hence, there was nothing to submit to the jury on that subject, and if there had been, it would have been the negligence of the independent contractor, for which defendants are not liable in any event."

The Supreme Court in its opinion affirming the judgment of the court below, says:

> "* * Plaintiff claimed consequential damages only; he did not ask payment for the wall that was taken down, nor for his ground occupied by the

new wall, nor compensation for material taken and applied to the purposes of the latter. He sought to recover only for loss of rent and the cost of repairing and refitting the theater. * * *

The party wall proceedings were in accord with the provisions of the Act of June 7, 1895, P. L. 135, and plaintiff neither alleged nor endeavored to prove defendant had not strictly complied with the law; but claimed to recover upon the theory that, while defendant had the legal right to erect the new wall, and, if necessary, to cause the removal of all obstructions standing in its way, yet in so doing it became liable as an insurer for all damages, direct or consequential, caused by the work in question, whether through negligence or other wise."

The questions of fact, of want of due care and negligence, or of liability on account of the work being done by an independent contractor, are, of course, settled so far as this court is concerned by the decision of the courts of Pennsylvania. The construction of the statute of Pennsylvania, as to whether or not it makes a party substantially an insurer or liable for consequential damages for proceedings under the statute, when made by the court of last resort of the State, is binding upon this court.

The assignments of error in this Court of plaintiff in error, (Transcript of Record p. 130) are: first, that the Supreme Court of Pennsylvania erred in holding that the party wall act did not violate the Fourteenth Amendment; second, that the party wall act did not deprive the plaintiff in error of his property without due process of law in violation of the Fourteenth Amendment; and, third, that the Party Wall Law denied to the plaintiff in error the equal protection of the laws, in

violation of the Fourteenth Amendment; have no application whatever to the issues presented, tried and determined by the Pennsylvania courts. Those questions were not raised in those courts, and could not have been raised in those courts under the pleadings of the plaintiff in error. The fourth assignment of error, particularly emphasizes the point above made. It is as follows: The Supreme Court of Pennsylvania erred in not sustaining the eighth assignment of error of the present plaintiff in error, which was:

> "The said Act of 1895, P. L. 139, if interpreted to exclude the recovery of damages for injuries done to the improvements on the adjoining property in the removal of an existing wall and the building of a party wall without proof of negligence in the doing of said work, is void as being contrary to the Fourteenth Amendment to the Constitution of the United States."

In other words, the plaintiff in error in the Pennsylvania courts raised no question whatever as to the constitutionality of the party wall statutes, the right to occupy the land, to make the improvments, or build a party wall; but claimed that under said Act, for the exercise of these rights given by the party wall statute an adjoining owner had the right to recover damages for injuries done to the improvements on the adjoining property, such as the removal of an existing wall. In other words, the plaintiff in error contended in the court below that, while the Party Wall Law was constitutional and an adjoining owner could follow the procedure therein provided, nevertheless, such adjoining owner in preparing for and building such party wall must pay the consequential damages resulting therefrom, and any construction of the statute which did not permit of such

recovery made the statute unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

Thus it will be observed that, excepting the question involved in the fourth assignment of error in this court, no questions were submitted, tried or adjudicated in the courts of Pennsylvania as to said statute being in conflict with the Fourteenth Amendment, nor could they have been raised under the pleadings and the evidence. If, therefore, they were not raised and could not have been raised under such pleadings in those courts, they cannot be raised now in this, the Supreme Court of the United States, for the first time, on this writ of error.

If authority in this court is needed for this elementary proposition, it will be found in *Leeper vs. Texas*, 139 U. S. 462, 467:

> "That to give this court jurisdiction to review the judgment of a State court under Section 709 of the Revised Statutes, because of the denial by the State court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way. *Spies v. Illinois*, 123 U. S. 131; *Baldwin vs. Kansas*, 129 U. S. 52; *Chappell vs. Bradshaw*, 128 U. S. 132."

In *Mutual Life Insurance Co. vs. McGrew*, 188 U. S. 291, this court said:

> "Our jurisdiction of this writ of error is asserted under the third class of cases enumerated in Section 709, and it is thoroughly settled that

in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed but at the proper time and in the proper way. The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised." Citing authorities.

To the same effect is *Electric Co. vs. Omaha*, 230 U. S. 123.

It is unnecessary to multiply authorities.

It is important to observe just what question, under the Fourteenth Amendment, this fourth assignment of error in this court raises, because the attention of the trial court and the Supreme Court of Pennsylvania was called thereto, but to no other question under the Federal Constitution. The only question raised by this objection is that the said Party Wall Act could not exclude the recovery of damages for injuries done to the improvements on the adjoining property *in the removal of the existng wall and the building of the party wall*, without offending against the Fourteenth Amendment. Stated in another form, if said Act did not provide for the recovery of consequential damages for the removal of the existing wall and the building of the party wall, then the Act was in conflict with the Fourteenth Amendment.

On page 24 of the brief of plaintiff in error the following proposition is made:

"III.

THE PARTY WALL ACT DEPRIVES AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE IT GRANTS HIM NO OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER HIS PROPERTY SHALL BE OCCUPIED AND NO COMPENSATION FOR PROPERTY ACTUALLY TAKEN."

The fourth proposition (page 31 of brief of plaintiff in error) is:

"IV.

THE POLICE POWER DOES NOT AUTHORIZE THE TAKING OR APPROPRIATION OF PRIVATE PROPERTY WITHOUT MAKING COMPENSATION TO THE OWNER."

The fifth proposition (page 53 of brief of plaintiff in error) is:

"V.

UNDER THE POLICE POWER, THE USE OF PROPERTY CAN BE REGULATED OR RESTRICTED FOR THE BENEFIT OF THE COMMUNITY AT LARGE ONLY, AND NOT IN THE INTEREST OF A PRIVATE INDIVIDUAL OR CLASS."

The sixth proposition (page 59 of brief of plaintiff is error) is:

"VI.

THIS PARTY WALL STATUTE IS NOT A REGULATION IN THE INTEREST OF THE PUBLIC SAFETY, HEALTH, MORALS OR CONVENIENCE."

The seventh proposition (page 65 of brief of plaintiff in error) is:

"VII.

THE PARTY WALL ACT, AS CONSTRUED AND APPLIED BY THE COURT BELOW IN THE INSTANT CASE, IS AN UNREASONABLE EXERCISE OF THE POLICE POWER."

The eighth proposition (page 75 of brief of plaintiff in error) is:

"VIII.

NO COMMON LAW RIGHT TO ERECT A PARTY WALL PARTLY UPON ANOTHER MAN'S LAND, WITHOUT HIS CONSENT, IS RECOGNIZED IN PENNSYLVANIA OR ELSEWHERE."

The ninth proposition (page 80 of brief of plaintiff in error) is:

"IX.

IN ENGLAND THERE NEVER HAS BEEN A COMPULSORY PROCEEDING TO ERECT A PARTY WALL, WHERE NO WALL EXISTED BEFORE."

The tenth proposition (page 101 of brief of plaintiff in error) is:

"X.

THE DECLARATION OF THE SUPREME COURT OF PENNSYLVANIA, THAT THE PARTY WALL ACT IS A SETTLED RULE OF PROPERTY IN THAT STATE, DOES NOT CONCLUDE THE RIGHTS OF THE PLAINTIFF IN ERROR UNDER THE FOURTEENTH AMENDMENT IN THIS COURT."

And on page 133:

"IF IT BE CONCEDED (WHICH WE DENY) THAT THE STATUTES GIVE AN OWNER AN UNASSAILABLE RIGHT TO ENTER UPON AN ADJOINING LOT TO ERECT A PARTY WALL, STILL THESE STATUTES DO NOT DENY THE ADJOINING OWNER THE RIGHT TO COMPENSATION."

The argument of counsel for plaintiff in error under all of these respective headings is upon the theory that property was taken without compensation, or without due process of law, and authority after authority is cited relating to the taking of property under the right of eminent domain. The whole front of plaintiff in error in this court is changed from that taken by him in the courts of Pennsylvania. There are no two features in the two faces that are alike.

If it be argued by plaintiff in error, as it doubtless will be, that the opinion of the Supreme Court of Pennsylvania, shows that these constitutional questions were considered and passed upon, a careful reading of that opinion and examination of the authorities cited will show that the constitutional question considered and decided by the Supreme Court of Pennsylvania related to the police power of the State and what could be done under that police power, and whether or not this party wall law had been passed under this police power. This was necessary to enable the court to pass upon the question presented to it, namely, if the party wall law of Pennsylvania be so interpreted as to deny the plaintiff in error compensation for consequential damages, would it be in conflict with either the Constitution of Pennsylvania or the Fourteenth Amendment to the Constitution of the United States. No other constitutional question was raised by the pleadings, or could have been decided, by either the trial court or the Supreme Court of Pennsylvania.

II.

THE DENIAL OF THE CLAIM FOR CONSEQUENTIAL DAMAGES IN THIS CASE IS NOT THE TAKING OF PROPERTY WITHOUT COMPENSATION, OR WITHOUT DUE PROCESS, IN CONFLICT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In construing the party wall statute of Pennsylvania, the court of last resort held that there was no provision therein giving the right to recover such consequential damages, and that no such right existed under the laws of said State. The injury complained of was *damnum absque injuria.*

If, therefore, in the exercise of its police power, the State had authority to pass this Party Wall Act for the protection of the public against the spread of fires and the like, the exercise of this right by those thus empowered would give no right to the recovery of consequential damages, unless it was so provided in the statute or the laws of said State.

The fact that special damage is suffered by the plaintiff in error beyond that incident to the public at large, does not give such right of action. As was said by this court in *Transportation Co. vs. Chicago,* 99 U. S. 635, 640:

> "A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute

be such as the legislature has power to pass, the acts are lawful, and are not nuisances unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it."

" * * Uncompensated obedience to a regulation enacted for the public welfare or safety, under the police power of the State, is not taking property without due compensation, and any injury sustained in obeying such a regulation is but *damnum absque injuria; New Orleans Gas Light Co. vs. Drainage Commission of New Orleans*, 197 U. S. 453."

Penna. R. R. Co. vs. Ewing, 241 Pa. 581, 591, (1913).

See also to the same effect:

Marchant vs. Penna. R. R., 153 U. S. 380.
Ettor vs. City of Tacoma, 228 U. S. 148.
Meyer vs. Richmond, 172 U. S. 82.

It cannot be too often reiterated that no question as to the validity of the Pennsylvania Party Wall Law was raised by the plaintiff in error on the trial or on the appeal of this case. The constitutionality of said Act had been so often affirmed and reaffirmed by the Supreme Court of Pennsylvania that counsel for plaintiff in error, like the profession of the State, accepted without question this established fact. The plaintiff in error by his pleadings, his evidence, and his argument in the courts of Pennsylvania, sought to engraft upon this admittedly valid law the right to recover damages resulting

from its enforcement, without proof of negligence or want of due care. The right to recover consequential damages from the proper enforcement of a valid State law depends upon that law, the Constitution and laws of the State, and is not a vested property right comprehended by the Fourteenth Amendment of the Constitution of the United States.

See *Monongahela Nav. Co. vs. Coons*, 6 W. & S. 101.

In *re Phila. & Trenton R. R. Co.*, 6 *Wharton* 25,
O'Connor vs. Pittsburgh, 18 Pa. 127.
Freeland vs. Penna. R. R., 66 Pa., 91.
Hardy vs. Thomas, 10 Watts, 63.

III.

THE PARTY WALL LAW OF PENNSYLVANIA, HAVING BECOME A RIGHT OF PROPERTY UNDER THE LAWS OF PENNSYLVANIA, ALL PROPERTY IS ACQUIRED SUBJECT TO THE RIGHT OF EASEMENT OF THE ADJOINING OWNERS, RESPECTIVELY SERVIENT AND DOMINANT THERETO, AND THE ADJUDICATION OF THESE RIGHTS OF PROPERTY, BY THE CONSTRUCTION OF SAID STATUTE BY THE SUPREME COURT OF PENNSYLVANIA, IS CONCLUSIVE UPON THIS COURT.

During the last two hundred years, one who acquired land in Pennsylvania, where the party wall law obtains, acquired it subject to the right of the adjoining owners to build a party wall upon the adjoiner's land, and likewise such adjoiner acquired the same right to build a party wall upon his adjoining neighbor's land. It is a right of property, just as if such right had been incorporated into the deed of conveyance. He acquires his land, or builds thereon, if he has no actual knowledge, with conclusive presumption of knowledge of these party wall rights.

As was said by Mr. Justice Moschzisker, delivering the opinion of the Supreme Court of Pennsylvania in the instant case, (263 Pa. 158, 171):

> "The building of party walls upon division lines between lots in certain of the cities of this State, while regulated by statute, has developed into the ordinary and natural way to use and enjoy real estate of that character, to such an extent as to 'become a settled rule of property' (*Heron vs.*

Houston, No. 1, 217 Pa. 1, 3), and, in effect, to make applicable the principal that every man is entitled to the ordinary and natural use and enjoyment of his property without being responsible to his neighbors for inconvenience or incidental losses which they may suffer through such enjoyment: see, on this general principle, *Penna. Coal Co. vs. Sanderson,* 113 Pa. 126, 145; *Penna. R. R. Co. vs. Lippincott,* 116 Pa. 472, 482 *et seq.;* and, on its application to a party wall case, *Negus vs. Becker,* 143 N. Y. 303, 308, *et seq.*

If it be said the building-owner of a party wall (meaning the one at whose instance the wall is constructed) uses not only his own property but also that of his neighbor, the answer is: In communities where party walls have for generations been recognized and regulated by legislation, such as the cities of Philadelphia and Pittsburgh, each adjoining lot owner has, for party wall purposes, what is tantamount to an easement of support in the premises of his neighbor (see note to *Bloch vs. Isham,* 92 American Decisions 287), to the full enjoyment of which he is entitled whenever he erects a wall of that character; and, when either lot holder builds upon his own property up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall. This is 'no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line:' *Evans & Watson vs. Jayne,* 23 Pa.

34, 36. The present proposition comes to this: The strip of land, the middle of which constitutes the dividing line between the properties of the plaintiff and defendant, was dedicated, in theory of law, to party wall use; and, when so desired by either of the respective owners, neither could, without the consent of the other, prevent its occupation for that purpose.

As declared in *Heron vs. Houston* (No. 1), 217 Pa. 1, 4, citing Western National Bank's Appeal, 102 Pa. 171, 'this right [of easement] cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom'; for (*Barnes vs. Wilson*, 116 Pa. 303, 307), the right to construct a party wall on the ground thus occupied by him 'arises out of a provision of the law to which all owners of real property * * * are subject, and in reference to which all conveyances * * * must be supposed to have been made and accepted.' Therefore, defendant committed no trespass against plaintiff when he entered upon his land; on the contrary, defendant, in so doing, exercised merely a lawful right conferred upon him by valid police statutes."

The following Pennsylvania authorities are illuminating upon the above proposition:

Heron v. Houston, 217 Pa. 1, 3.

"It is too late at this day to question abstractly the right of the legislature to confer upon municipalities the power of regulating party walls. Never since we have been a state have we been without legislation of this kind; and every enactment on

the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the other's land, for the construction of a party wall for their common enjoyment and use. This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to disturb, but its constitutionality has been recognized by judicial authority in unmistakable terms. 'There can be no available objection', is the language of the court in *Evans & Watson v. Jayne*, 23 Pa. 34, 'to the principle upon which our laws as to party walls is based. * * The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line.' "

Evans & Watson vs. Jayne, 23 Pa. 34, 36.

"The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist upon a separation by a boundary more substantial than a mathematical line. This imaginary line is common, and so ought the real one to be."

Roberts vs. Bye., 30 Pa. 335.

"A right to a party wall is a right which an owner of land has to build a division wall partly over his line on the land of another. It is therefore a right appurtenant to land and may be properly called an easement or servitude."

Western National Bank's Appeal, 102 Pa. 171.

"Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken away from him by the adjoining owner building exclusively upon his own land, either to the line, or a short distance therefrom. The first builder is he who first elects to make a party wall and his right cannot be defeated by the act of another. * * *

Each lot being alike servient to the other for that purpose. * * *

Deeds ought to be interpreted subject to its provisions, * * *

The rule enters into the titles of adjoining lots, * * * ."

Barns vs. Wilson, 116 Pa. 303.

"The right [to erect a party wall] arises out of a provision of the law, to which all owners of real property in the city of Philadelphia are subject, and in reference to which all conveyances of land, whether in fee or for years, must be supposed to have been made and accepted. * *

These are not defects in title; they are simply the legal conditions which affect the owner's enjoyment of his own property."

These decisions of the Supreme Court of Pennsylvania hold that the Party Wall Law is a settled rule of property in the State of Pennsylvania, wherever the Party Wall Law applies. This right of real property

was established and became embedded into the law of Pennsylvania, as will be hereafter shown, over two hundred years ago, or about seventy-five years before Pennsylvania became a State. This court will not now disturb the same.

Jackson v. Chew, 12 Wheaton, 153; 26 U. S. 153.

(Page 162):

"The inquiry is very much narrowed, by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals.

This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of."

(Page 167):

"It has been urged, however, at the bar, that this court applies this principle only to state constructions of their own statutes. It is true that many of the cases in which this court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State when applied to the title of lands."

Green v. Neal's Lessee, 6 Peters, 291, 10 S. C. 119.

"Since this decision, the law has been considered as settled in Tennessee; and there has been so general an acquiescence in all the courts of the State, that the point is not now raised or discussed. This construction has become a rule of property in the State, and numerous suits involving title have been settled by it.

* * * *

In 9 Cranch, 98, the court say, that 'in cases depending on the statute of a State, and more especially in those respecting titles to lands, the federal courts adopt the construction of the State, where that construction is settled and can be ascertained.' And in 5 Wheat. 279, it is stated, that 'the supreme court uniformly acts under a desire to conform its decisions to those of the state courts, on their local laws.'

The supreme court holds in the highest respect decisions of state courts upon local laws forming rules of property. 2 Wheat. 316. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the state tribunals. 6 Wheat. 119. The court say, in the case of *Elmendorf v. Taylor et al.*, 10 Wheat. 152, 'that the courts of the United States, in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government.'

* * * *

In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the States. The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope."

Barrett v. Holmes, 102 U. S. 651.
(Page 655):

"The Supreme Court of Iowa has, by several decisions, construed the five years' statute of limitations, which is set up as a defence in this case, to apply to an action brought by one claiming under a tax deed, as well as to one brought by the orginal owner of the land. *Brown v. Painter*, 38 Iowa, 456; *Laverty v. Sexton*, 41 id. 435. And the court so ruled in this case. See *Barrett v. Love*, 48 id. 103.

By these decisions the Supreme Court of the State has established a rule of property in the State of Iowa which is binding on this and other courts of the United States. *Jackson v. Chew*, 12 Wheat. 153; *Beauregard v. New Orleans*, 18 How. 497; *Suydam v. Williamson*, 24 id. 427; *Nichols v. Levy*, 5 Wall. 433; *Williams v. Kirtland*, 13 id. 306.

So far, therefore, as this point is concerned, it must be considered as settled."

Bucher v. Railroad Co., 125 U. S. 355.

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the

highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts."

There is another principle of law applicable to the rights of property established by the Party Wall Law of Pennsylvania, namely: Courts will not overturn statutes and decisions long acquiesced in, where rights have been acquired thereunder, unless called upon to do so by some imperative necessity, or for reasons admitting of no doubt. Pennsylvania has had a party wall law continuously over two hundred years, applying to Pittsburgh over one hundred and twenty-five years, ever since its organization as a borough in 1794. It is significant that the provisions of the original Act of 1721, applying to Philadelphia, are substantially the same as those of the present Act of 1895, applicable to Pittsburgh. The people of Pennsylvania have, for these two hundred years, continuously exercised these party wall rights under the construction given thereto by its courts. Buildings have been erected and are under construction, and property has been acquired, all subject to these party wall laws.

Commonwealth vs. Kneeland, 20 Pick. (Mass.) 206, 217.

"It seems now to be somewhat late to call in question the constitutionality of a law, which has been enacted for more than half a century, which has been repeatedly enforced, and the validity of which, it is believed, until this prosecution, has never been doubted, though there have been many prosecutions and convictions under it."

12 *Corpus Juris,* 715, Sec. 67.

"(3) Effect of Long Acquiescence. Legislative or executive construction of constitutional provisions, adopted and acted on with the acquiescence of the people for many years is entitled to great weight with the courts; and where not manifestly erroneous, it will not be disturbed. The injustice that would inevitably result by the disturbing of such constructions after a long period of acquiescence therein, during which many rights will necessarily have been acquired, is a very strong argument against it."

Ogden v. Saunders, 12 Wheat. 132.

"* * * Although the law under which Ogden was discharged appears, by the record, to have been passed in the year 1801, yet, it is proper to notice, that this was a mere revision and reenactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present, (except from the 3rd of April, 1811, until the 14th of February, 1812) in all its material provisions which have any bearing upon the present question. To declare a law null and void after such a lapse of time, and thereby prostrate a system which has been in operation for nearly forty years, ought to be called for by some urgent necessity, and founded upon reasons and principles scarcely admitting of doubt."

IV.

THE PARTY WALL LAW OF PENNSYLVANIA: ITS EXISTENCE FOR OVER TWO HUNDRED YEARS: ITS ENACTMENT AND ENFORCEMENT BEING A PROPER EXERCISE OF THE POLICE POWER OF THE STATE, COMPLIANCE THEREWITH IS NOT PROHIBITED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This title will be discussed under the following headings:

1. History of party wall laws generally.

2. History of the Pennsylvania statutes relating to party walls.

3. Leading Pennsylvania cases construing party wall statutes.

4. The enactment of the Pennsylvania Party Wall Law was under the police power of the State, and is a proper exercise of said power, and therefore, where private property is affected by the exercise of this power, no compensation need be made or can be recovered, unless expressly so provided by the statutory enactment.

1. *History of Party Wall Laws Generally.*

The genesis of party wall laws in England was the great London fire of 1666. The then loss of life and property demanded precautions against their recurrence. Such laws are primarily designed to protect life and property, and, secondarily, to contribute to the economy, welfare and convenience of the community.

Justice Read, in *Vollmer's Appeal,* 61 Pa. 118, reviews the English statutes:

> "The Building Acts in England were principally directed to the preservation of dwellings from fire, and the main cause of them arose from the great fire of London in 1666. Two acts were passed in the reign of Charles the Second, and two in the reign of Queen Anne: 6 Anne, c. 31, and 7 Anne, c. 17, from which last acts our provincial legislation of 1721 was partially drawn. The provisions of these acts, so far as relate to fires, are stated by me in *The Harmony Fire Company vs. Trustees of the Fire Association,* 11 Casey 496.
>
> The Act of 6 Anne was for the better preventing of mischief that may happen from fires, and provided, that party walls between house and house, shall be wholly of brick or stone, and of two bricks thick at least in the cellar and ground stories, and thirteen inches thick upwards from the foundation, quite through all the stories of each house, and eighteen inches above the roof. This applied to all houses within the bills of mortality. The Acts of 7 Anne excepted the houses on London Bridge, and made some additional regulations. Various acts were passed on this subject in 1724, 1759, 1763, 1766, and 1772, until a general act was passed em-

bodying all the former provisions which was the 14 Geo. III, c. 78, which, owing to its obscurities, met the disapprobation of the bench.

The Metropolitan Buildings Act, 7 & 8 Vict., c. 84, was passed 9th August, 1844, 1 Chitty's Collection of Statutes, 2d ed. 1851, p. 333. This act provided 'with regard to party walls in reference to the component materials thereof, every part of such party wall must be built of sound bricks or of stone, or of such bricks and stone together laid in and with mortar or cement, in such manner as to produce solid work.' Page 377. And it is further enacted, that all buildings not according to this act shall be deemed a nuisance. P. 340.

By the 27th section, if without the written consent of the adjoining owner, the owner of the premises shall make any opening in any external wall adjoining such ground or building (which means a wall built entirely on his own ground and not a party wall), such adjoining owner can require him to stop up such opening with brick or stone work, and if he does not, then he may stop it up himself, and recover the expense from the owner of the wall.

This act, with the exception of sections 54 to 63, both inclusive, is repealed by Act 18 and 19 Vict. c. 122, passed 14th August, 1865 (1 Chitty's Collection of Statutes, 3d ed. 1865, p. 432), which is the present law regulating the construction of buildings in the metropolis and its neighborhood. The walls must be of brick or stone, or other hard and incombustible substances; no opening shall be made in a party wall except where the buildings are united in the same occupation and then only

under very strict and peremptory regulations, such as requiring two wrought iron doors to close the opening."

The same learned Justice, in *Harmony Fire Co. vs. Trustees of the Fire Association*, 35 Pa. 496, 499, said:

"By the Act of 6 Ann., ch. 31, for better preventing mischief by fires, the church wardens of each parish within the Cities and Liberties of London and Westminster, and the bills of mortality, were to fix upon the mains and pipes belonging to any water-work, such and so many stop-blocks of wood, with a two-inch plug, and so many fire-cocks to go into each main or pipes as they might direct, the top of the stop-block to lie even with the pavement, that such plugs or fire-cocks might always upon occasion of any fire be opened and let out the water, without loss of time in digging down to the pipes; and each parish was to have and keep in good order a large engine, and also a hand-engine, to throw up water for the extinguishing of fires, and also one leathern pipe and socket, of the same size as the plug or fire-cock, that the socket might be put into the pipe, to convey the water clean and without loss or help of bucket into the engine; and gratuities were given to the turn-cock whose water was first found on, and to the first, second and third engine keepers, of thirty, twenty and ten shillings, in the order in which they came on the ground with all their apparatus in complete order. And the watermen belonging to each insurance office, not exceeding thirty for each office, were free from being impressed or compelled to go to sea, or serve as marines, or as soldiers on land. By this Act, and those of 7 Ann. ch. 17, and 2 George 1, ch. 28, party walls were directed to be built of brick or stone, and of a certain thickness."

It will be observed that these Acts in terms were designed to prevent the spread of fires, and the legislative purpose in this respect in passing such Acts was thus expressly declared.

These Acts all contain the feature of permitting one to build a part of his wall on his neighbor's land. Since *Vollmer's Appeal* was decided, the entire subject of building regulations has been revised in the London Building Act of 1894, Sec. 87. This Act retains the principle of permitting party walls to be built, each adjoining land owner contributing a part of his land for this purpose.

Similar party wall provisions are incorporated in the present French Code, and are of ancient standing. Code Civil (Article 651-676). The origin and the application under the Code show them designed for the safety, convenience and economy of the public. This part of the French law was adopted by the State of Louisiana at an early date.

Merrick's Revised Civil Code of La., 2d Ed. Article 675 contains the following:

> "Dividing walls in cities.
>
> He who first builds in the cities and towns, or their suburbs, of this State, in a place which is not surrounded by walls, may rest one-half of his wall on the land of his neighbor, provided he builds with stones or bricks at least as high as the first story, and not in frame or otherwise; and provided the whole thickness of this wall do not exceed eighteen inches, not including the plaster, which must not be more than three inches."

The constitutionality of this law would appear to have been generally accepted in the State of Louisiana, as it has never been questioned or passed on in any case in that State.

Iowa has had party wall provisions similar to these of Pennsylvania for many years, and they are now part of the present Code. Code of Iowa (1919), Sec. 6435.

The Iowa law has been frequently before the courts. Its constitutionality was specifically passed upon in the case of *Swift v. Callan*, 102 Iowa, 206; 37 L. R. A. 462; 72 N. W. 233. The court in this case upheld the Act as a proper police regulation. It also emphasized the fact that such legislation had had forty-two years of recognition and enforcement. The constitutionality was again raised in *Lederer vs. Colonial Investment Co.*, 130 Iowa, 157; 106 N. W. 357, and in *Percival vs. Colonial Investment Co.*, 140 Iowa 270, 115 N. W. 941, but not pressed, nor has it been seriously questioned in Iowa since *Swift vs. Callan.*

South Carolina has had party wall legislation since the colonial times, and although party wall law has existed since the beginning of the State its constitutionality has never been questioned in that State.

The District of Columbia has had party wall regulations since 1791. Regulations established in that year for the city of Washington provided that all lots were to be purchased subject to the right of first builders to encroach on adjoining land for party wall purposes, thus declaring the right to be a rule of real property. The provisions of this plan were several times enacted by by-laws and recognized by Acts of Congress. *Miller v. Elliott,* 5 Cranch. 543. (D. C. Reports). Although

the party wall law, as set forth in the present District of Columbia Code, differs in many respects from the law of Pennsylvania and other States, yet it preserves the compulsory features of permitting the building of such walls without agreement or consent of the parties.

New York has never had party wall legislation, but has enacted laws designed to regulate and adjust building lines, not at all similar to the party wall law, and the decisions from that State are not in point.

New Jersey has never enacted party wall legislation, although the city of Camden attempted by ordinance to adopt the Pennsylvania party wall law as it applied to Philadelphia immediately across the river.

In *Traute vs. White*, 36 N. J. Eq. 437, 19 A. T. L. 197, Vice Chancellor Pitney questions the validity of such legislation in New Jersey but distinguishes the situation in Pennsylvania:

> "And I think it proper to say further that but for the expressed dictum of Chancellor Green in *Hunt v. Ambruster* (.....), 17 N. J. E. 208, I should have thought an act or ordinance authorizing a party to build a wall on his neighbor's land to be simply not legislation but usurpation. * * * 'Legislation' he says 'regulating and authorizing party walls was had in Pennsylvania as early as 1721, and became embodied in its colonial system and was a part of it when it became a State and adopted a written constitution', and on this ground it may be that such legislation can be justified in that State. Upon similar grounds, legislation authorizing a compulsory drainage of meadows is justified in New Jersey. *Hoagland v. Wurts*, 41 N. J. Law 175; in courts of error, 42 N. J. Law, 553; 43 N. J. Law 456; 114 U. S. 606; 5 Sup. Ct.

Rep. 1086; *State v. Blake*, 36 N. J. Law 442. But an examination of these authorities, especially the opinion of Chief Justice Beasley in 41 N. J. Law, shows that, but for the sanction of ancient usage, that sort of legislation could not be supported."

The constitutionality of such ordinances was upheld by Chancellor Green in *Hunt v. Ambruster*, 17 N. J. Eq. 208, above referred to, where it is held that an ordinance in the City of Camden, giving any builder the right to erect half of his wall upon the adjoining lot, and requiring the adjoining owner to pay half the value of so much as he may use,

"is not repugnant to the Constitution of the United States or of this state, because compensation is not provided for the land occupied by the wall. The land is not taken for public use, and, therefore, not within the terms or meaning of the Constitution. The land is not taken from the owner in any sense. It remains his, together with the wall constructed upon it. If he use it, or any part of it for building purposes, he is required to pay the adjoining owner a moiety of the cost of the portion so used. The ordinance, for purposes deemed equally advantageous to both the adjoining proprietors, and beneficial to the corporation at large, imposes a burden upon the land. The proprietor of the land thus burdened, in contemplation of law, receives an equivalent in the corresponding easement which he enjoys in the land of the adjoining proprietor. Similar laws have existed from a very early period in England and in this country, and they have been regarded, not as unauthorized violations of the property or rights of the citizen, but rather * * * as evidence of a vigilant and civilized police."

Massachusetts as a State never enacted party wall legislation. It did have a Provincial Act applying to Boston passed in 1692, (1 Prov. Laws St. Ed. 42). The Constitution of Massachusetts, later adopted, expressly provided for the repeal of all laws "repugnant to the rights and liberties contained in this Constitution." This Act of 1692 was in a state of "innocuous desuetude" from the organization of the State until some time prior to 1885, when an attempt was made by a property owner to exercise certain rights under the Act.

In *Wilkins vs. Jewett,* 139 Mass. 29; 29 N. E. 214, the court held the Act invalid, partly for the reason that it was expressly repealed by the Constitution of Massachusetts, and partly on the basis of desuetude.

The court said:

> "It is a significant fact that since the adoption of the Constitution, no trace can be found of any legislative or judicial sanction of the provisions of the provincial statute upon which the plaintiff relies. We think it has been regarded as repugnant to the principles of the Constitution and is of no force."

This case has been much quoted by text writers and has been cited in many cases questioning the constitutionality of party wall legislation. It need only be commented:

(a) There was no State legislation authorizing party walls. Rights under the Provincial Act had never been exercised.

(b) Up to the date of the above quoted case, it had been uniformly accepted as having been repealed by the constitutional provision, and had never become a part of the land law or the policy of the State.

As far as we are able to ascertain, the question of whether or not party walls are an exercise of the police power has never been before the United States Supreme Court, except inferentially, in *Wurts vs. Hoagland,* 114 U. S. 606, where Mr. Justice Gray, in the opinion, said, (page 612):

> "But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvements, are rules of police of the same character as provisions concerning party walls and partition fences."

Party wall laws, so far as the investigations of counsel have disclosed, do not obtain in any of the other States of the Union except Pennsylvania.

2. *History of the Pennsylvania statutes relating to party walls.*

Pennsylvania had party wall laws before 1721. In that year an Act was passed to regulate the same. Since 1721 it has had party wall legislation. Before 1721 it doubtless practiced rules and regulations adopted from the English law, but without express enactment. It never repealed any of the Acts, except by re-enactment, with the exception of where districts were merged with larger districts possessing such legislation. None of these Acts provided for compensation for the land occupied or for the property damaged, except the Acts of 1893 and 1899 relating to Philadelphia. The Act of June 7, 1895, P. L. 135,—the Act in controversy here,—is a general building code, and contains substantially the provisions of the First Provincial Act of 1721. These Acts, and the practices under them, created property rights, and conveyances were made and titles taken subject thereto long before the adoption of the Fourteenth Amendment.

The party wall Acts are referred to in their chronological order:

ACT OF FEBRUARY 24th, 1721, 1 Smith Laws 124.

> "WHEREAS divers inconveniences, irregularities and controversies, have lately been, and still frequently happen, in relation to party-walls, and laying the foundation of buildings, in the city of Philadelphia: For the remedying whereof for the future, *Be it enacted*, That no person or persons, builder or builders, whatsoever, shall, from and after the twenty-fifth day of March, one thousand seven hundred and twenty-one, lay the foundation of any building or party-wall within the said city, before

they have applied themselves to the surveyors or regulators, to be appointed by the Mayor and Commonalty of said city, in their Common Council, who are hereby empowered to appoint two or more discreet and skilful persons for that purpose.

II. *And be it further enacted,* That the said surveyors or regulators, upon application to them made, shall have full power and authority to enter upon the land of any person or persons, in order to set out the foundations, and regulate the walls to be built between party and party, as to the breadth or thickness thereof: Which foundation shall be laid equally upon the lands of the persons, between whom such party-wall is to be made; and first the builder shall be reimbursed one moiety of the charge of such party-wall, or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use or break into the said wall. The charge or value thereof to be set by the said regulators.

* * * * *

IV. *Provided always, and be it further enacted,* That if either party, between whom such foundation or party-wall is to be made, shall find themselves any ways aggrieved, by the order or direction of the said regulators, he or they may appeal to the Mayor and Commonalty of the said city, at their next Common Council, who shall finally adjust and settle the same; which shall conclude and bind all parties; the costs whereof to be paid as the Mayor and Commonalty shall direct and appoint."

The contention of plaintiff in error, that this Act evidently referred to walls built by agreement, has no basis of reason or authority. *Western National Bank's Appeal,* 102 Pa. 171.

The Act of March 26, 1762, (1 Smith Laws, 248), relating to the District of Southwark, and the Act of March 9, 1771, (1 Smith Laws, 319), relating to Northern Liberties, both now parts of Philadelphia, contains substantially the same provisions in regard to party walls as the Act of 1721.

The Act of April 15, 1782, (3 Smith Laws, 48; Stat. at L. of Pa., vol. 10, p. 485), is an act entitled, "An Act to amend and render effectual an act entitled 'An Act for regulating party walls and partition fences in the City of Philadelphia'," etc.

The Act of September 12, 1783, (2 Dallas, 124; 11 Stat. at L. 124) incorporating the Borough of Reading, had elaborate provisions on party walls, similar to the Act of 1721 relating to Philadelphia.

The Act of April 22, 1794, (15 Stat. at L. 161) which is the Act incorporating the Borough of Pittsburgh, provides that the Burgess and inhabitants of the Borough of Pittsburgh shall possess al powers, jurisdiction, authority and privileges as are granted to the Borough of Reading by the Act of September 12, 1783.

This is the beginning of Pittsburgh as a Borough, and of party wall legislation applying to Pittsburgh, at the same time.

The Act of March 28, 1803, (4 Smith Laws 35), which incorporated part of the Township of Northern

Liberties, now part of Philadelphia, confers the power upon the borough authorities to locate and regulate party walls in substantially the words of the Act of 1721.

The Act of March 5, 1804, P. L. 263; 17 Stat. at L. p. 648, conferred additional powers upon the Borough of Pittsburgh. Section 6 provides that the town council may

> "make such rules, regulations and ordinances as shall be determined by a majority of them necessary to promote the peace, good order and advantage of said borough, particularly * * * making permanent rules relative to the foundations of buildings, party walls and fences; * * *."

The Act of March 8, 1816, P. L. 160, was the incorporating act of the *city* of Pittsburgh. Section 5 provides that the city council were to have the same powers as formerly exercised by the borough.

The Act of June 21, 1839, P. L. 370, provides:

> "SECTION 7. That the surveyors or regulators appointed under the provisions of the act of twenty-fourth of February, seventeen hundred and twenty-one (and of the several supplements thereto) entitled an act for regulating party walls, buildings, and partition fences in the city of Philadelphia, and the district of the Northern Liberties, be and the same are hereby authorized to enter upon the premises or lands of any person or persons in the said city or district to determine upon the sufficiency of any party wall or walls, for the purpose of which any store, or dwelling, erecting, or to be erected, is designed and to determine and direct the builder

or builders thereof to remove any such insufficient party wall or walls, and to regulate and determine the breadth and thickness of any such wall, to be erected between party and party, according to the provisions of the second section of the said act, but at the proper charge of the applicant therefor, and under and subject to the provisions of the said act and the several supplements thereto."

There appears to have been some question at that time as to the rights of the surveyors and regulators after a party wall had been erected, under the provisions of the Act of 1721, to further exercise control over the same, and the above Act removed these doubts.

The Act of April 5, 1849, P. L. 409, supplemental to an Act incorporating the Borough of West Philadelphia, confers substantially the same rights as to party walls as the Act of 1721.

All of the Acts previously quoted provided for compensation to the builder of the party wall whenever the non-builder made use thereof. The question then arose as to whether this right was personal or passed with the land. The Act of April 10, 1849, P. L. 600, was passed to settle the question. Section 4 of the Act provides that the right to such compensation by the builder, unless otherwise expressed in the deed, *shall run with the land.*

The Act of April 22, 1850, P. L. 549, supplements by Section 11 thereof the Act of April 5, 1849, above referred to, relating to the Borough of West Philadelphia, and provides that the provisions of said Act relative to party walls, to which this Act is a supplement, shall not apply to lots on which frame houses

are now erected or may be erected previous to the application to lay foundations for such party walls. Repealed by Act of 1869, P. L. 188.

The Act of April 3, 1851, P. L. 320, being a general act relating to boroughs, provides:

> "Section 7. That every borough thereafter incorporated shall have power to make all needful regulations concerning foundations for party walls and buildings."

The Act of February 2, 1854, P. L. 21, further supplements the Act entitled "An Act to incorporate the city of Philadelphia." Section 27 provides that the councils of Philadelphia shall appoint surveyors and regulators who shall have power to decide as to the position and thickness of party walls, the condemnation thereof for insufficiency, the proper structure of new buildings and the party walls thereof, so as to secure the safety and health of the citizens under the statutes enforced in said city.

The Act of May 7, 1855, P. L. 464, is entitled "An Act to provide for the regulation and inspection of buildings in the city of Philadelphia *and for the better preservation of life and property.*" Section 8 confers authority to regulate the thickness of party walls in all buildings thereafter erected, constructed, built or altered, in the city of Philadelphia.

The Act of April 11, 1856, P. L. 319, contains provisions of a similar character.

The Act of April 16, 1857, P. L. 222, is an Act regulating party walls in the city of Erie. This Act contains the usual party wall provisions, similar to those to which reference has been made.

The Act of May 20, 1857, P. L. 590, relates to party walls in Philadelphia, and gave power to the inspectors of buildings to condemn existing party walls and cause their removal, at the expense of the builder, and to cause him to erect another party wall suitable for the use of the adjoining owner who desired to build on his own lot.

The acts of the inspectors are final. *Childs vs. Napheys,* 112 Pa. 504.

The Act of April 13, 1868, P. L. 965, regulates party walls in the city of Scranton, substantially the same as the Acts to which reference has been made.

The Act of April 8, 1872, P. L. 986, relates to party walls in the city of Pittsburgh. The portion of the Act of 1895, P. L. 135, relating to party walls—the Act in controversy here—is a reenactment of the Act of 1872, P. L. 986.

The Act of April 10, 1873, P. L. 647, extends the right to locate and regulate party walls granted to the city of Erie by the Act of April 16, 1857, P. L. 222, to the Borough of Corry.

The Constitution of Pennsylvania, adopted in 1874, prohibited special legislation, and thereafter there were no acts incorporating boroughs and cities, such incorporation being authorized by general laws.

The Act of May 23, 1874, P. L. 230, divided the cities of Pennsylvania into three classes, Philadelphia being the first class, the cities of Pittsburgh and Scranton the second class, and all others in the third class. Section 20, clause 26, of this Act provides that cities of the third class shall have power:

"to enter upon the land or lands, lot or lots, of any person or persons within said city, at all reasonable hours, by their duly appointed city engineers, in order to set out the foundations and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party wall is to be made, and the first builder shall be reimbursed one moiety of the charge of such party wall, or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall or may use or break into said wall."

The Act of June 8, 1893, P. L. 360, regulated the construction, inspection and maintenance of buildings. This Act applies only to cities of the first class, the city of Philadelphia. It contained the usual party wall provisions but added to the same a new feature, namely, that the party building the party wall in place of an existing party wall "shall make good all damages occasioned thereby to the adjoining premises."

Before referring to the Act of June 7, 1895, P. L. 135, which is the Act relating to the city of Pittsburgh in controversy here, and would be next in chronological order, reference will be made to the Act of May 5, 1899, P. L. 193. This Act, like the previous Act of June 8, 1893, applied only to the city of Philadelphia, or rather to cities of the first class. This was a comprehensive Act, creating a Bureau of Building Inspection and regulating the construction, inspection and maintenance of buildings and party walls. In addition to these other provisions it contained the usual provisions, to which reference has been heretofore made, relating to party walls, their construction, inspection, removal, etc.

and also contained substantially the same provisions as the Act of 1893, to wit: that where there was a party wall existing, and it was defective, out of repair, or insufficient, so that it could not be used for the proposed new building, the cost and expense of the repair or removal thereof and the erection of a new wall should be borne by the parties erecting the new building, and that "they shall also in such case make good all damages occasioned thereby to the adjoining premises."

These two Acts, relating only to the city of Philadelphia, are the only party wall laws in the State of Pennsylvania which require the payment of damages to the adjoining premises for the removal of the old wall and the erection of the new party wall, and such damages are only provided for in the event that there was theretofore an existing party wall which had to be removed, for the exclusive benefit of one of the adjoining owners.

In the case now in controversy, even in the city of Philadelphia, where this provision of the statute would apply, there could be no recovery of damages, because the wall that was removed, of which plaintiff in error complains, was not a party wall but a wall located wholly on his own premises, and was not erected originally as a party wall.

These two Acts are significant to the present controversy in another aspect. If any such liability for damages existed as is contended for by the plaintiff in error, then these provisions for damages provided by these two Acts were wholly unnecessary. The justice and equity of these provisions of the Philadelphia statutes, which doubtless influenced the legislature in their passage, are manifest. Where a party wall existed

sufficient for all the purposes of the adjoining owner, and the other adjoiner desired to erect a new party wall of different construction, adapted to the necessities of his proposed new building, and on that account desired to repair or remove the old party wall, it was only fair that he should not only pay the expense of such repair and removal, but also any damages to the adjoining premises which were thereby occasioned. These statutes introduced in this respect an entirely new element, which does not otherwise obtain in the erection of party walls.

However, as stated, even this provision for the payment of damages is by statute limited to the city of Philadelphia, and this liability did not exist prior to 1893 when the first Act was passed.

We now come to the Act in controversy in this case.

The Act of June 7, 1895, P. L. 135, is entitled "An Act Regulating the Construction, Maintenance, Alteration and Inspection of Buildings and Party Walls in Cities of the Second Class." As stated, this includes the City of Pittsburgh. This is a most elaborate and comprehensive enactment, evidently framed with great care, and shows the exercise of consummate skill and expert knowledge. It covers over 30 pages as printed in the laws of 1895.

As its specific provisions contradict so many of the objections made by the plaintiff in error to this party wall law,—for example, that his property was taken for selfish purposes, by a private individual, without opportunity being given him to be heard or to object,—more elaborate references and analysis will be now made than otherwise would seem necessary.

Section 1 provided that this Bureau of Building Inspection should be attached to the Department of Public Safety and be under the supervision and control of the Director of that Department.

Section 2 provided that the principal officer of the Bureau should be a superintendent of building inspection, who should be either an architect, practical builder, civil engineer, or carpenter, and the other officers of the Bureau should consist of an assistant superintendent and such number of inspectors, clerks, messengers and other employes as the said Director of the Department of Public Safety should deem necessary; all subject to the approval of the City Council. The superintendent and all of the inspectors were required to be either practical builders, civil engineers, carpenters or bricklayers, and all of them should not be of the same occupation. None of these officers should be employed or engaged in any other business or be interested in any contract for building or furnishing materials to be used for building in the city.

Section 3 required that the clerk of the Bureau should keep a complete record.

Section 4 required the superintendent or his assistants, or the inspectors, to examine all buildings in the course of erection or alteration as often as necessary and make written report of any violations of the Act. The superintendent and his assistants, or his inspectors, were to examine all buildings reported insecure or dangerous or which may be damaged by fire or accident, and make a written report of such examination, stating the nature etc. of the damage. They were also required to examine all buildings for which applications were made for permits to raise, enlarge, alter, build upon,

tear down, move or remodel, and make written reports. These records were to be open to the inspection of the Chief Engineer of the Bureau of Fire, or any officer of the city, or of any party whose property was affected.

Section 5 required the Bureau of Building Inspection to be furnished by the owner, contractor or architect with copies of the general drawings, plans and specifications of any proposed erection or alteration, and the proper officer of the Bureau was required to grant permits for such erection or alteration only when the same were in conformity with the requirements of the Act. These permits could not be issued until after the plans and specifications had been examined and approved. These plans were to be deposited in the office of the Bureau. The Bureau was authorized to require any applicant for a permit to give notice to any person whose property interests would be affected. No building was to be erected or altered and no work affecting the strength or fire risk of any wall or building could be done without permit from the Bureau. Appeals from the decision of the Bureau were authorized. Any person whose property may be affected under any of these permits was given the right to appeal, and these appeals were referred to the entire corps of the building inspectors as a board of appeal. The board of appeal after full hearing could direct the superintendent to issue the permits or withhold the same and impose any conditions and make any other order in the premises that they should deem proper. Any party aggrieved by the decision of the board of appeal could make a further appeal to the Director of the Department of Public Safety. The Director of the Department of Public Safety was required to appoint a commission, to consist of three disinterested parties, who should be either master builders, civil engineers or architects, who

were required within such time as the Director should specify, not exceeding five days, to carefully consider the appeal and decide, and the decision of the majority of the commission was to be final.

Here, then, is an elaborate system of investigation by competent parties, skilled in the art, with two appeals, the last to be heard by disinterested experts appointed by one of the highest officers of the city,—the Director of the Department of Public Safety.

Section 6 related to the construction of outside or division walls of non-combustible material.

Section 7 required all foundation walls to be laid not less than three feet below the exposed surface on a good solid bottom, and "in case the nature of the earth should require it, a bottom of driven piles or caissons filled with concrete or footing stones or iron shall be laid to prevent the walls from settling and all piers, columns, posts or pillars resting upon the earth shall be set upon a bottom in the same manner as the foundation walls." There are other elaborate provisions here with reference to the foundations.

This Section particularly applies to the controversy here, because, as already stated, in order to get a solid bottom, resort was had to driven piles and caissons as required by the statute.

Section 8 provides that whenever any owners of property wish to excavate to a depth not exceeding 15 feet below the top of the curb in front of the wall, and there shall be any party walls or other walls wholly or partly upon adjoining land and standing upon or near the boundary line of the lot, the owners can be compelled to make the wall safe and secure, and if they do not do so the Bureau of Building Inspection is given authority to do the work at the cost of the owner.

Section 9 is the main party wall provision of said Act. It is here given in full. It provides for notices, hearings, decisions, and is a carefully devised provision for the protection of the interests of all parties.

"SECTION 9. Any person or persons who may be now erecting or may desire hereafter to erect any house or building in such cities, and who may desire to erect therewith a party wall to be used in common by the person or persons erecting, and the owner or owners of the adjoining lot may apply to the said Bureau of Building Inspection of such cities signifying his or their intention to erect a party wall, and describing the location of his or their lot and the lot adjoining, partly upon which said party wall is to be erected, with the plans and specifications of the said proposed wall and the materials of which the same is to be built, whereupon it shall be the duty of the said Bureau of Building Inspection to appoint a time at which the Superintendent thereof, or some person by him authorized, will meet the party or parties upon the premises, not more than five days thereafter, of which application a copy, with notice of the time so appointed, shall be served by the said Bureau of Building Inspection upon the occupant of said lot at least three days before the time so fixed. If said lot is unoccupied the said notice shall be served upon the owner or one of the owners of the same, if he reside within the county in which such city is situate, at least forty-eight hours before the time fixed. Service thereof may be made either personally or by leaving a copy of the notice at the residence of the owner or occupant. If there be no owner or occupant resident in the said county, or if such owner be unknown such notice shall be posted

upon the premises and shall be equivalent to a service. At the time appointed, the Superintendent of the said bureau, or some suitable person by him appointed, shall have the line dividing said lot properly surveyed by the bureau of engineering and surveys of such city, and the land upon which the said party wall is to be erected, with the breadth and length of the same, and which wall shall be equally one half upon the land of each of the adjoining owners, unless the adjoining owners shall object that said wall as proposed is thicker than necessary for the purpose of any ordinary building. If such objection shall be made, then the said Superintendent, or the person by him appointed, shall determine how much of said wall shall be placed upon each of said lots and shall decide the same within forty-eight hours after the said objection has been made, and his decision shall be final and conclusive upon all parties. The said party wall shall be erected by the party first building at his own cost, including the cost of the survey, plans and specifications herein required, and when fully completed the cost of the same shall be ascertained by the said Superintendent, or his agent, who shall, at the same time, determine the proportion thereof to be paid by the adjoining owner of which he shall give a certificate to the builder, which certificate shall be conclusive of all matters therein contained: Provided, That at least forty-eight hours notice shall be given by said Superintendent, or his agent, to the owner or owners or occupant of said adjoining lot before said certificate shall be given to the builder of the time and place when he may be heard with reference to the same. The owner or owners of said adjoining lot, his or their heirs, assigns or lessees, shall not use said party wall by building

into or against it, or by in any way using it for any new building or structure, until he or they shall have paid to the first builder or builders, his heirs or assigns, the proportion of the cost of said wall as fixed by said Superintendent, or his agent, or of so much of it as he may desire to use. Whenever any party wall shall become impaired in whole or in part, or whenever the same shall in whole or in part be unfit or unsafe for the purpose of erecting a new building or buildings upon the adjoining lot and the owner or owners of said wall, or any one of the same, shall desire to have said wall repaired or shall desire, in whole or in part, to tear down said wall and have erected a new party wall for the purpose of then erecting a new building, any one of the owners of said wall may apply, in writing, to the Bureau of Building Inspection, signifying to such Bureau his or their desire in reference to said wall, and it shall thereupon be the duty of said Superintendent, or his authorized agent, to examine the same, having given notice as prescribed in this section when said examination shall take place, the said Superintendent, or his agent, shall, within six days after said application has been made, decide what, if any, alteration or repairs shall be made in said walls and whether it is necessary that the whole or any part, and if so, what part of said party wall shall be torn down and a new one erected for the purpose of new buildings which either party may then desire to erect, which decision, in writing, shall be final and conclusive upon all parties. The said Superintendent, or his agent, shall also determine in what proportion the cost of repairing or of tearing down part or the whole of the old wall and the erection of part or whole of the new wall shall be borne by the respec-

tive owners of said lots, which decision shall also be in writing and shall be conclusive upon all parties. It shall be the duty of any court of common pleas of the county within which such city is situate, on application made by the proper parties in interest, to enjoin and restrain any subsequent builder on the adjoining lot from cutting or breaking into or using said new party wall, or any part thereof, until he or they shall have first paid to the first builder, his heirs or assigns, his or their fair proportion of the cost of said party wall or of the cost of, in whole or in part, tearing down the old wall, or, in whole or in part, of erecting a new party wall as said proportion shall have been estimated by the said Superintendent or his lawful agent of the said Bureau of Building Inspection. For the purpose of performing the duties enjoined by this section the said Superintendent and the proper officers of the said Bureau of Building Inspection and their assistants may, at all reasonable hours, enter upon any of the lands within said city for the purpose of performing the duties herein required. All of the necessary expense incurred in and about the performance of the duties named in this section, including the preparation of plans and specifications, survey and draughts, shall be borne and paid by the person or persons at whose instance and request the work shall be done, which expense may be computed in determining the final cost of such party wall. All sums of money so paid shall be returned to the city treasurer of such city by the public officer receiving the same. In all conveyances of houses and buildings the right to and compensation for the party wall built therewith shall be taken to have passed to the purchasers, unless otherwise expressed and reserved, and the owner

of the house, for the time being, shall have all the remedies in respect to such party wall as he might have in relation to the house to which it is attached. All party walls authorized hereby shall be built solidily from the cellar bottom to the top of the fire wall."

Section 10 applies to the footing or base course under foundation walls.

Section 11 applies to the foundation walls.

Section 12 applies to partition walls.

Section 13 requires trusses where buildings have over 34 feet span, etc.

Section 14 provides for the height of stories for all given thicknesses of wall.

Section 15 applies to dwelling houses.

Section 16 applies to vaults.

Section 17 applies to the strength of girders, etc.

Section 18 applies to the construction of stone walls 24 inches or less.

Section 19 applies to the quality of the bricks and how laid.

Sections 20 and 21 relate to party walls, and are as follows:

"SECTION 20. In no case shall the side, end or party wall be carried up more than one story in advance of the front and rear walls, unless the

said walls be secured to the side, end or party walls by iron anchors at least one and one-half inches wide by three-eights inches thick and four feet long; and all stone used for the facing of any building, except where built with alternate headers and stretchers as hereinbefore set forth, shall be strongly anchored with iron anchors in each stone, and all such anchors shall be let into the stone at least one inch. The front, rear, side or party walls shall be anchored at each tier of joists at intervals of not more than ten feet apart, and the ends of all such joists, beams or girders so anchored to the walls that a falling joist, beam or girder will free its own anchorage and may fall without injury to the wall, and where the joists are supported by the girders, the ends of the joists resting on the girders may lap each other, and each joist covering the entire width of the girder and strapped by wrought iron straps not less than one and a half inches by three-eighths of an inch and not less than eighteen inches long, and at the same distance apart and on the same line of joists as the wall anchors, and this shall not prohibit hanging joists in iron stirrups from the girders, but in all such cases the joists must be strapped as before described."

"SECTION 21. All front, side or rear party walls not corniced and where no gutter is required, shall be built up and extended at least ten inches above the roof, and coped with stone or metal or other incombustible material; and where the roof is of the kind known as Mansard or French or of any style excepting as above specified, unless the same is constructed of fire-proof material throughout, the party wall shall be carried up to a height

of not less than ten inches above the flat or slope of said roof, and shall extend through the lower slope at least six inches distant and parallel with the roof covering, and be corbelled out at least six inches or to the outer edge of all projections, and shall be coped with incombustible material. Where a wall is finished with a stone cornice the greatest weight of material of such cornice shall be on the inside of the face of the wall. All exterior cornices and gutters hereafter erected shall be of some fire-proof material, and in every case, except where sheet metal is used the greatest weight of the material of which the cornice shall be constructed shall be on the inside of the outer line of the wall, allowance being made for the leverage produced by the projection of the cornice beyond the face of the wall; and in all cases the walls shall be carried up to the under side of the roof planking and where the cornice projects above the roof the wall shall be carried to the top of the cornice. All exterior wooden cornices or gutters that may hereafter be damaged by fire or by decay to the extent of one half the value thereof shall be taken down and if replaced shall be constructed of some fire-proof material, but if not damaged to this extent may be repaired with the same kind of material of which originally constructed: Provided, That the above provision regardng fire-proof cornices shall not apply to frame buildings."

Section 22 covers the exterior openings for doors and windows and the manner in which they shall be constructed.

Section 23 provides for the support of iron beams or girders spanning openings.

Section 24 provides for identification of iron columns, posts, beams, etc., by the manufacturer or founder stamping thereon the name or title.

Section 25 provides for the rules to be observed in the construction of masonry walls with iron beams or girders and columns.

Section 26 provides for the ascertainment of the weight that each floor will sustain in stores, warehouses and factories to be erected, altered or repaired.

Section 27 provides for stairways, fire-escapes, etc. on school-houses, churches, public buildings, factories, etc.

Section 28 relates to hoists, hoistways, elevators, etc.

Section 29 provides for the building of chimneys, etc.

Section 30 provides for the construction of hearths.

Section 31 provides how smoke-pipes may enter flues, etc.

Section 32 provides for the installation of the smoke-pipes to furnaces and the placing of boilers.

Section 33 relates to hot air registers and flues and the fire-proofing thereof.

Section 34 relates to the placing of wooden girders and has this provision relating to party walls;

"* * * and all joists or other timbers in the party walls of any building hereafter erected, whether built of stone, brick or iron, shall be separated from the joists or timbers entering into the opposite side of the wall, by at least four inches of solid mason work."

This same section relates to trimmers and joists separating the partitions.

Section 35 applies to the planking and sheeting of the roofs of buildings and how dormer windows shall be covered, etc.

Section 36 relates to fire-proofing materials to be used on certain classes of buildings.

Section 37 provides for the erection of a wooden shed while the new building is being erected.

Section 38 prohibits the projection of frame bath-rooms from upper stories of buildings, except under certain conditions.

Section 39 relates to certain restrictions upon the erection of frame sheds to be attached to dwellings.

Section 40 is a ten-page regulation of theaters and buildings for public entertainment, providing for their construction, the exits, with elaborate provisions with reference to balconies, staircases, etc.

It was under this Section, after an examination thereof and of the wall of said theater that was exposed by the tearing down of the adjoining building by the Rosenbaum Company, that the said wall was pronounced unsafe and the plaintiff in error notified that the theater could not be operated until the unsafe and dangerous wall had been removed and rebuilt.

Section 41 provided for the license fee for permits.

Section 42 provided that when not prohibited or regulated by this Act councils of cities of the second class may by general ordinance and not otherwise prescribe the manner in which buildings shall be constructed and the character of material to be used in order to furnish the best protection against fire, etc.

Section 43 provides that in case of final decision of an inspector, or the Bureau, or the commission on appeal, the decision or order, if not complied with, may be certified to the court, which upon application of the Director of the Department of Public Safety may issue a mandatory decree requiring compliance with such order or decision. If the decree is not complied with the court is given the power to enforce its order by attachment or to issue an order to the sheriff commanding him to remove the wall, building or structure condemned by the Bureau etc.

Section 44 provides penalties for violation of the provisions of the act.

Section 45 makes it the duty of Councils to enact such ordinances as may be necessary for the proper enforcement of the provisions of the Act, and to prescribe reasonable penalties for non-compliance therewith.

The elaborate provisions of this Act demonstrate, and no argument could add to the conclusiveness of that demonstration, that said Act was purely and simply, a police regulation. It was designed and intended primarily to prevent fires and the spread thereof, and secondarily to provide for the health, welfare, convenience and comfort of the whole community. It was

passed not only to protect property but to safeguard the life and limb of men, women and children when attending the theaters or other public buildings, mills, factories, &c., and especially to protect the lives, health and welfare of children in the public schools.

The Act of March 7, 1901, P. L. 20, is an Act relating to the government of cities of the second class (Pittsburgh and Scranton), being the charters of said cities. Article XIX, Section 3, clause 41, granted power to enter upon the land or lands, lot or lots, of any person or persons within the city, etc., for the locatng and regulating of party walls in the same general terms as used in the above quoted Act of 1895.

The Act of June 27, 1913, P. L. 568, is an Act for the incorporation, regulation and government of cities of the third class. Article V, Section 3, Clause 44, again confers the power upon these municipalities to locate and regulate party walls in substantially the same words as used in the original Act of 1721.

The Act of 1915, P. L. 312, known as the General Borough Code, confers upon boroughs the authority to locate and regulate party walls.

The foregoing history of party wall legislation in Pennsylvania, shows that Pennsylvania has been and is unequivocally committed to party walls, as a regulation for the public welfare, safety and convenience and as a protection against loss of life and property. This policy goes back 75 years or more before Pennsylvania became a State. The Province of Pennsylvania was granted to William Penn by the English Government in 1681. He came over here in 1682 and founded Philadelphia. Within a few years thereafter Philadelphia became a city of over 300 houses with a population of 2500. About 35

years thereafter, in 1721, when the Party Wall Act was passed, it contained the recital,—"Whereas Divers Inconveniences, Irregularities and Controversies Have Lately Been, and Still Frequently Happen, in Relation to Party Walls and Laying the Foundation of Buildings in the City of Philadelphia for the Remedying Whereof for the Future Be It Enacted," etc. It is thus evident that these "divers inconveniences, irregularities and controversies" arose during that 35 years when some kind of a party wall law was in vogue and operation.

It is natural to suppose that William Penn was greatly impressed with the necessity for a party wall law, just as the legislature of England was, by the great London fire, which had occurred only 15 or 16 years before Penn came to this country and founded Philadelphia. It may well be that he was present in London about the time of the great fire and saw the awful havoc to life and property thereby occasioned. It is reasonable to assume that Parliament acted in passing its first party wall law because of some popular outcry or public sentiment that demanded protection against the recurrence of similar catastrophes to that which had just been suffered in London. It is not unlikely that being thus impressed, the founders of Philadelphia, in the 35 years that elapsed between such foundation and the passage of the party wall law of 1721, introduced at Philadelphia some form of party wall observance,—possibly copied from the English statutes. However, in 1721 these observances had been in vogue a sufficient length of time to warrant the legislature in deciding that "divers inconveniences, irregularities and controversies had lately been and still frequently happen in relation to party walls in the city of Philadelphia", and accordingly the Act of 1721 was passed to remedy the same, and to frame in terms the party wall law that was thereafter to obtain.

It is evident, therefore, that Philadelphia, from its very beginning, had a party wall law. Pittsburgh was incorporated as a borough in 1794, and, by the act of incorporation, was likewise given a party wall law. Both of these cities, throughout their entire existence, have never been without substantially this same party wall law. All other cities in the State, and all the boroughs of the State, have been granted by legislative enactment this same law of party walls.

Even before Pennsylvania became a State,—certainly since,—party walls became its settled, fixed policy, and, as will hereafter appear, these laws have satisfied the people and have been uniformly, unreservedly and enthusiastically endorsed by the bench of the State. During these two hundred years and more, party walls have been constructed by the hundreds of thousands. No allowance was made for consequential damages to the adjoining owner caused either by the removal of the old wall or the erection of the new, because the statutes did not so provide. That also was a fixed policy. All titles were taken subject to this easement. All buildings were erected subject thereto.

3. *Leading Pennsylvania cases construing party wall statutes.*

Evans & Watson vs. Jayne, 23 Pa. 34. (1854).

This case arose under the Act of April 5, 1849, P. L. 409.

Lowrie, J., p. 36:

"There can be no available objection to the prinicple upon which our law as to party walls is based. The law as to partition fences involves the same principle. It exists partially in London: St. 14 Geo. 3, c. 78. It has constituted part of the law of France for ages, and is fully carried out in the Code Napoleon, ss. 653-673. In that law (s. 659) we find the very provision on which this case proceeds, that the builder of a new house may take down a party wall that is insufficient for his purposes, and rebuild it at his own expense; and this expense is the best protection against an abuse of the right, the exercise of which cannot be of frequent occurrence. See also Pothier's Traite de Societe, app. du Voisinage, s. 247, etc.; Pothier's Coutumes, Des Servitudes, art. 235, etc.; Voet ad Pand. 8, 2, 15-17; Pothier ad Pand., L. 10., S. 67.

The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line. This imaginary line is common, and so ought the real one to be, and it is only in the character of this, that the difficulty lies which requires legislation. When it is constructed, the regulation of

its enjoyment and repair is as plain as that belonging to any other property held in common. And there is nothing more severe in submitting the question of the sufficiency of walls in a city to the city surveyor, than there is in submitting the sufficiency of fences in the country to fence viewers. The principle is the same, and if the interests involved in the one case are greater than in the other, it is only because of the nature of city property, that it requires more expensive partition walls or fences than are required in the country. The provisions of the law are substantially the same in both cases.

Taking these suggestions in connection with the facts that the wall in question was a party wall, built half on each side of the line of the lots, and that the Acts of Assembly of 1839 and 1849 apply only to such walls, *we can see in those acts no such invasion of private rights as requires us to regard their provisions with suspicion.* This proceeding was under the Act of 5th April, 1849, P. L. 411, and *the process there provided is complete in itself without any appeal, and we cannot imply that any was intended;* and herein too it resembles the fence laws."

The above case settled the question of right of appeal to the courts.

Under the present Party Wall Law, applicable to the city of Pittsburgh, there is provided an elaborate system of inspection, approval by the superintendent of the Bureau, appeal to the Board of Inspectors, and appeal to the Director of the Department of Public Safety, who appoints an independent commission of experts to hear the same.

As was said in the case of *Shenk vs. McKennan,* 11 Pa. Super. Ct., 84:

> "The scope and purpose of the act is to place the construction of buildings in cities of the second class under the supervision and control of municipal officers for the purpose, not of determining or affecting the rights of particular property owners, but that building shall be pursued according to certain general rules to the end that the city may be improved by regularity, safety and symmetry of construction and that the citizens may be protected from the perils of unsafe or improper construction. The act, therefore, as a whole, affects the exercise of municipal power; the number, character, power and duties of certain municipal officers, and the regulation of a subject matter within the appropriate range of municipal control."

In *Vollmer's Appeal,* 61 Pa. 118, Mr. Justice Read, delivering the opinion, said, (pp. 126, 128):

> "On the 24th February, 1721, the legislature of the province passed an act for regulating party-walls, buildings and partition fences in the city of Philadelphia, which had received its charter from the proprietary nearly twenty years before. It gave the appointment of surveyors or regulators to the mayor and commonalty in their common council, who were empowered to set out the foundations and regulate the walls between party and party as to the breadth or thickness thereof; which foundation shall be laid equally upon the lands of the persons between whom such party-wall is to be made, and the first builder shall be reimbursed one moiety of the charge of such party-wall, or for so

much thereof as the next builder shall have occasion to make use of, before the next builder shall any way use or break into the said wall. The charge or value thereof to be set by the said regulators.

Persons were forbidden under a penalty to begin or lay the foundation of a party-wall before the same be reviewed and directed by the regulators, from whose decision an appeal lay to the mayor and commonalty at the next common council.

This common sense legislation was far in advance of that of the mother country. Similar laws were enacted in relation to the district of Southwark on the 26th March, 1762, and to the southern parts of the Northern Liberties of the City of Philadelphia, on the 9th March, 1771. These laws in full are to be found in 1 *Hall & Sellers* 101, 293, 390.

The city, as laid out by William Penn, was a parallelogram of two miles east and west from river to river, by one mile from north to south, with nine streets from east to west, of which two were its outer boundaries, and twenty streets running from north to south. The distance between the streets made very deep lots, whether fronting on the east and west, or north and south streets, and in the division of city property, led to narrow fronts with great depths, and to the erection of back buildings, a style peculiar to Philadelphia. The regulation of party-walls, so as to secure the largest inner frontage to dwellings, became, therefore, a matter of vital importance.

The Act of 1721 was revived and amended by the Act of 15th April, 1782, 3 Sm. Laws 48, and the power of appointment of the regulators was subsequently vested in the corporation of the city. The appointment of regulators in the various districts outside of the old city, is to be found in the Acts of Assembly given in the note at page 11, of the edition of the ordinances, published by the direction of councils in 1851.

The claim for reimbursement of the moiety of the costs of a party-wall, was only a personal charge against the builder of the second house, and was *a chose in action* of the first builder, which has, however, been changed by the Act of April 10th, 1849, Pamph. L. 600, and it now passes to the purchaser.

The duties of the regulators are now devolved upon the board of surveys, as constituted by the Acts of the 2d February, 1854, 21st April, 1855 and 13th May, 1856, whose power extends over the whole of the present city. On the 7th May, 1855, Pamph. L. 464, the legislature passed 'An act to provide for the regulation and inspection of buildings in the city of Philadelphia, and for the better preservation of life and property,' which, with the additional Act of 11th April, 1856 (Pamph. L. 319, 20th May, 1857, Pamph. L. 590, and 13th April, 1858, Pamph. L. 244), form the present supervisory system over the buildings of the metropolis.

The practical wisdom of our colonial legislature one hundred and fifty years ago, laid the foundation of the Pennsylvania system of party-walls, a great and radical improvement upon the principles of the common law, as expounded by the Eng-

lish courts, and those of Massachusetts and New York. Their decisions are collected by Mr. Washburn, in the second edition of his Law of Easements, ch. 4, Sec. 3, p. 535.

The most striking instance of a just application of equitable principles, is to be found in *Campbell v. Meiser*, 4 John Ch. R. 334, decided by Chancellor Kent in 1820, and of a narrow-minded one in *Sherred v. Cisco*, 4 Sandford's S. C. Rep. 480, decided by Judge Sandford in 1851. After speaking of the civil and the French law of servitudes, he says: 'It may well be that sound policy dictates similar legislation in this state, but we do not feel at liberty to import doctrines from the civil law, however benign or equitable, which conflict with established common-law principles.'

From this review of the doctrines applicable to party-walls, it is clear that it must be a solid wall (without openings), of brick or stone, or other incombustible material. This is required by the policy, as well as the letter of the law. This is the doctrine enunciated by the present Chief Justice, in *Vansyckel v. Tryon*, 24 Leg. Int. (1867) p. 140. If the first builder does not comply with the law and make the wall a solid one, 'he becomes a trespasser and wrongdoer.'"

Roberts v. Bye, 30 Pa. 375. (Lowrie, C. J. p. 377):

"*A right to a party-wall, is a right which an owner of land has to build a division-wall partly over his line on the land of another. It is therefore a right appurtenant to land, and may properly be called an easement or servitude.* In Philadel-

phia, this relation between adjoiners is regulated by statute. He that first builds on his line must erect the wall at his own expense, and it is then, as one whole wall, an essential part of his house, and is therefore real estate. Yet half of it rests on his neighbor's land, which is charged with a servitude for this purpose.

The owner of the house has no charge against anybody for the half thus built on his neighbor's land; but the wall is his own, and the neighbor cannot use it without paying for so much of it as he intends to use; and, in paying, he may use it, and then the wall becomes a common wall, and each lot becomes appurtenant to the other so far as needed for its support. The owner of the wall has, therefore, a contingent claim against the adjoining lot owner that he shall pay for his share of the wall before using it, though it is half on his ground. The price to be paid is, consequently, a fixed lien on the lot, to be enforced by restraining the full use of it until the wall is paid for: 8 S. & R. 59; Smith's Ex. Int. Sec. 74."

Western Natl. Bank's Appeal, 102 Pa. 171.

Bill to enjoin the use of a division wall. The statutes involved are the Acts of Feb. 24, 1721 (1 Smith's Laws 124), and the Act of May 7, 1855, (P. L. 464).

Mr. Justice Trunkey (p. 183):

"*Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose,* not going beyond the prescribed limit. *This right cannot*

be taken from him by the adjoining owner building exclusively upon his own land, either to the line, or a short distance therefrom. The first builder is he who first elects to make a party wall and his right cannot be defeated by the act of another: *Monroe vs. Conroy*, 1 Phil. 441; *Morris vs. Balderston*, 2 Brew. 459. Prior to the Act of 1855, the extent of the encroachment was determined by the regulators. In *Godshall vs Mariam*, 1 Binn. 352, it was said: 'There is great reason why the decision of the regulators unappealed from, should be conclusive as to the building, because if it were not, the walls which were built under the authority of the officers, whom the party was obliged to employ, might be afterwards pulled down. This would be a grievance too ruinous to be submitted to, and cannot be intended to be the meaning of the law.' This would apply to the thickness of the wall as well as to the location with reference to the line.

An owner cannot encroach upon the adjoining lot save for the construction of a party wall. Each lot being alike servient to the other for that purpose, when the first builder lays the foundation over the line it is presumed that he does so in the exercise of his right. Though he may bring the wall above the basement within the line of his lot, he is bound to use it as if built according to the statute. It matters not that the foundation covers less of the adjoining lot than is allowed by law; he shall not build so as to deprive the adjoining owner of his privilege: *Milne's Appeal*, 2 W. N. C. 513.

* * *

The statute was enacted at an early day in the building of the city, and has proved a just and beneficial rule for owners of adjoining lots. Deeds

ought to be interpreted subject to its provisions, and the usual description by metes, courses and distances, will not be held to defeat the grantor's right under the statute when he conveys a lot adjoining one which he continues to hold. To have the effect of depriving him of that right the language of the deed must imply such intent. The rule enters into the titles of adjoining lots, unless otherwise expressed."

Child vs. Napheys, 112 Pa. 504.

The facts are given in the opinion of the court.

Mr. Justice Paxson, (p. 507):

"The wall of the plaintiff in error was condemned as insufficient by the building inspectors under the Act of 20th of May, 1857, P. L. 590, entitled, 'An Act in relation to party walls' * * * The Act of 1849 is not given in Purdon, for the reason probably that the editor regards it as superseded or supplied by the Act of 1857. Both Acts were clearly intended to give a summary remedy for settling disputes in regard to party walls. That some such remedy is essential in large cities is self-evident. If the erection of buildings is to be delayed pending ordinary common law or equity proceedings, such delays would be ruinous and intolerable. The Act of 1857 refers the whole matter to the building inspectors, with an appeal to the board of surveyors as provided by the Act of 1855. * * * It seems to have been assumed in support of the second objection that it was the duty of the court below to have referred the case to a master to have found the facts as in the case of a bill in equity.

This view entirely ignores the whole scope and spirit of the Act of 1857, which was intended, as before stated, to give a summary remedy. Under that Act the decision of the building inspectors was final and conclusive, saving only an appeal to the board of surveyors which must be taken within three days. The Act gives no appeal to the Court of Common Pleas, and that court has no jurisdiction to review the case upon the merits. If it has jurisdiction at all, it is only to enforce the decision of the building inspectors, as was done in this case."

(Page 510):

"The further point was made that the appeal given by the Act of 24th February, 1721 (1 Sm. L. 124), and the Act of 15th April, 1782, 2 Id. 48, has not been taken away by subsequent legislation.

It is sufficient answer to this to repeat what was said by the court in *Evans v. Jayne* (*supra*) in speaking of the Act of 1849: 'This proceeding was under the Act of 5th April, 1849, and the process there provided is complete in itself without any appeal, and we cannot imply that any was intended; and herein too it resembles the fence laws.'"

Barns v. Wilson, 116 Pa. 303.

The case comes under the Act of May 20, 1857, P. L. 590. As stated in the syllabus, (2), it was held:

"The removal of a party wall by an adjoining owner in Philadelphia under the provisions of the act of May 20, 1857, P. L. 590, even though the leased premises become uninhabitable by the ten-

ant, does not constitute such an eviction under a paramount title as will relieve the tenant from the payment of rent."

Mr. Justice Clark, (p. 307):

"The right of the adjoining owner to maintain the party wall in such form as to support the building he proposed to erect, was not in any proper sense a defect in the plaintiff's title. *The right arises out of a provision of the law, to which all owners of real property in the city of Philadelphia are subject, and in reference to which all conveyances of land, whether in fee or for years, must be supposed to have been made and accepted. Titles to real estate are everywhere held subject to such constitutional and legal conditions affecting the enjoyment thereof, as shall from time to time be established; all are subject to the commonwealth's right of eminent domain and to such statutory and other police regulations as affect the safety, health and good order of society;* one tract of land, from its mere location with respect to another, may owe it a servitude, and one man must so use his property as not unnecessarily to injure another. These are not defects in title; they are simply the legal conditions which affect the owner's enjoyment of his own property. If the conveyance in this case, instead of a lease for years, had been in fee, with the usual covenants for title and enjoyment, it would certainly not be pretended that the existence of the party wall, or its removal, would have constituted such a breach as would have sustained an action. The title, for anything that appears, was perfect under the law, and the possession was in accordance with the title. If the party wall may be called an encumbrance at all, it is an encum-

brance in the same sense as a public road, of which, as it affects the physical condition of the property, the purchaser must take notice. Such an encumbrance would not be within the meaning of the ordinary covenant of title or of quiet enjoyment: *Memmert v. McKeen*, 112 Penn. St. 315.

The law relating to party walls, as was said in *Evans & Watson v. Jayne*, 23 Penn. St. 34, is no invasion of the absolute right of property; it prescribes simply a rule for the convenient, economical and safe enjoyment of property by the owner; and with reference to which, all conveyances must be supposed to have been made. It must therefore be assumed, that this contract of lease was made with reference to such a possible contingency as did in fact occur. The lessee might have protected himself by a special contract, but he did not, and therefore cannot complain. The act of the adjoining owner was a lawful act, performed in a lawful and proper manner, and the lessor took no part in the performance of it, indeed, was wholly powerless to prevent it."

Note: The appellant, Jackman, in the instant case invoked the law of the foregoing case with reference to the very property in question in *Jackman vs. Harry Davis Enterprise Co.*, 256 Pa. 215 (1917), and recovered rentals for the period the wall was being constructed. He now objects to having the same law applied to himself.

McVey v. Durkin, 136 Pa. 418.

This case construes the Act of May 20, 1857, (P. L. 590). Action in trespass for the tearing down of a portion of plaintiff's wall, use of another portion and the careless manner in which the work was prosecuted.

Hoffstot v. Voight, 146 Pa. 632.

This case involves the Act of April 8, 1872, (P. L. 896). [Pittsburgh Act]. The facts are as follows, opinion. (p. 634):

> "The plaintiff and the defendant were the respective owners of adjoining buildings situated on Liberty Street, Pittsburgh, between which was a party wall. The plaintiff desired to erect a new building on his lot, and applied to the building inspector to examine said party wall, and determine what repairing or replacing thereof was necessary for the purpose of such new building. After notice to both the plaintiff and the defendant, the building inspector examined the wall, and directed that it be torn down and a new one erected in its place. The defendant, who was present, thereupon requested or suggested that the new wall be made to correspond, in the depth of the foundation, with a party wall that had been erected on the opposite side of defendant's lot. This would make the foundation start two feet lower down than the original plan of the plaintiff contemplated.
>
> The plaintiff acceded to the suggestion, and the building inspector made an award accordingly. The plaintiff proceeded to tear down the old wall, and erected the new wall so that one half thereof stood upon his own lot, and the other half upon the defendant's lot, the line between the two lots having been surveyed and marked by the city engineer."

The following is quoted from the opinion, Mr. Justice Mitchell (p. 636):

> "The regulation of party walls is a very ancient form of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. Those in-

terested will find the subject discussed in a note to *Bloch v. Isham*, 7 Amer. L. Reg., N. S., 10. But such regulation, as it exists in this and most other states, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant.

The plaintiff's right to recover in this action, therefore, must clearly appear in the provisions of the act of April 8, 1872, P. L. 986. Section 5 of that act, providing for tearing down and replacing an existing party wall, which is unsuited for a new building about to be erected, is the one under authority of which plaintiff proceeded; but that section does not determine when contribution from the adjoining owner shall be due, and to ascertain this we must turn to Section 4, which provides that the adjoining owner 'shall not use said party wall by building into or against it, or by in any way using it for any new building or structure, until he shall have paid,' etc. This provides for two contingencies: First, a new wall where none was before, which cannot be used at all till payment; and, secondly, a new wall replacing an old one, of which no new use can be made without paying. If the old wall is sufficient for the old use, and the new one is built solely to accommodate a new use, the adjoining owner who merely continues the old use cannot be called upon to contribute for his neighbor's improvement. The statute does not make him in any way liable to pay until he begins himself to make a new use of the new wall, and his liability even then is for his proportion of so much of the wall only as he uses. Thus, if the wall is one hundred feet high, as modern buildings not unfrequently are, and the adjoining

owner only desires to use forty feet of it, he is only liable for four tenths of one half the cost of the wall, and he cannot be called upon to pay that till he begins to make actual use of it. This is the plain language of the statute, and it is the fair and just rule. It is, moreover, in accordance with the construction always given to the act of 1721, regulating party-walls in Philadelphia, and thus keeps the laws in the two great cities of the commonwealth in harmony."

Deringer vs. Augusta Hotel Co., 155 Pa. 609.

Bill to enjoin the entering upon, building, injuring, removing, damaging, tearing down, or in anywise destroying a party wall, and from erecting any new party wall on plaintiff's land. This case involved the Acts of May 7, 1855 (P. L. 464), and May 20, 1857 (P. L. 590).

Syllabus:

"The fact that an owner of land or his predecessor in title has built a party wall encroaching four inches on his neighbor's land, will not, in the absence of an agreement to the contrary, prevent him from subsequently building a wall encroaching to the limit authorized by the Act of May 7, 1855, P. L. 466, which is six and one half inches for a brick wall."

Mr. Justice McCollum:

"It is manifest that the injunction was granted on the theory that the rights of the owners of the adjoining lots in reference to the party wall between them were definitely settled by the construction of the wall which is now condemned as insufficient for the appellant's new building, and as the old wall

encroached upon the appellee's lot but four inches, the appellant is precluded from erecting a new wall which shall occupy more than that space upon it. It does not appear upon this record at what time or by whom the first wall was built, or that the parties who then owned the lot entered into an agreement on the subject of the party wall which extinguished or impaired any of their statutory rights in reference to it. In the erection of a party wall suitable for the buildings it is designed to support, there is no undertaking by either party that he will not thereafter construct a building which requires a wider and better wall, nor is there any implied surrender by him of any right in relation thereto which the statutes confer. These statutes define the rights and duties of the owners of lots in reference to the party wall and, in the absence of an agreement which renders them inapplicable, govern in the construction of it. In the first proviso to section eight of the act of May 7, 1855, P. L. 466, the encroachment upon an adjoining lot for party wall purposes is limited to six and one half inches for the brick wall and it is not alleged that the appellant in the construction of its building proposes to exceed this limit. It affirmatively appears that the appellant is proceeding in conformity with the act referred to, and the provisions of the act of May 25, 1857, P. L. 590. These acts are applicable to the case presented by the pleadings. Bailey's Appeal 1 W. N. 350 Appeal of Western Natl. Bank, 102 Pa. 171."

Kirby vs. Fitzpatrick, 168 Pa. 434.

Mr. Justice Fell:

"The earlier legislation upon the subject fixed no limit to the right of encroachment in the con-

struction of a party wall. The act of Feb. 24, 1721, conferred upon the surveyors or regulators a discretion to determine the thickness of party walls, one half of which could be placed upon the adjoining lot. The discretion given to the surveyors was unchanged until a minimum thickness of nine inches for a party wall was fixed by the act of 25th April, 1852. The act of 2nd February, 1854, sec 27, gave the surveyors power to 'finally decide upon all questions of party lines, the positions and thickness of party walls' under the statute then in force. The act of 7th May, 1855, first limited the right of encroachment, and fixed the extent to which an adjoining lot could be used in the construction of a party wall by a proviso to the 8th section as follows: 'provided any lot of the width of sixteen feet or less shall not be encumbered by more than nine inches of the stone foundation wall, or more than four and a half inches of the brick wall, nor in any case shall any party wall be placed on the adjoining lot more than ten inches for the stone wall or more than six and a half inches for the brick wall.'

* * * * *

"* * * This right is statutory. It is not a right at any time and for any purpose to use the land of another, but only for the purpose and in the manner provided. The extent of the use, subject to the limitations imposed, is to be determined by the character and size of the building to be erected, and is within the discretion of the inspectors. The builder should not be permitted to take more of his neighbor's land than he needs for the purpose of his building. The whole system of party wall legislation rests upon the principle of mutuality of burdens and benefits.

* * *

The building inspectors may in their discretion because of the nature of the ground or the intended use of the building, or for other reasons, require the erection of a thicker wall without regard to the height of the building. If they do so the right to use more of the adjoining lot up to the maximum limit follows, but the necessity as far as it affects the right is to be determined by the inspectors, not by the builder."

Shenk vs. McKennan, 11 Pa. Super. 84 (1899).

The statute under discussion is Act of June 7, 1895, P. L. 35, Section 8, the same act involved in the instant case, Section 9 being the section relating to party walls.

W. W. Porter, J., (p. 88):

"The scope and purpose of the act is to place the construction of buildings in cities of the second class under the supervision and control of municipal officers for the purpose, not of determining or affecting the rights of particular property owners, but that building shall be pursued according to certain general rules to the end that the city may be improved by regularity safety and symmetry of construction and that the citizens may be protected from the perils of unsafe or improper construction. The act, therefore, as a whole affects the exercise of municipal power; the number, character, power and duties of certain municipal officers, and the regulation of a subject matter within the appropriate range of municipal control. The act speaking generally is therefore constitutional * * *"

Buck v. Weeks, 194 Pa. 522.

The defendant, by the direction of the building inspectors, tore down the party wall between himself and the plaintiff and entered upon the plaintiff's land for the purpose of placing supports under the walls of the plaintiff's building. Plaintiff declared in trespass for unlawful entry with force and the unlawful tearing down of a party wall. No negligence was shown in the work, nor had any objections been made to defendant's entry at the time. Plaintiff was non-suited. Affirmed by the Supreme Court.

Mr. Justice Fell:

> "The plaintiffs declared in trespass for the unlawful entry with force and arms upon their premises and the tearing down of the party wall between their building and that owned by one of the defendants. The proofs utterly failed to sustain the averments of their declaration. They showed that the entry was for the purpose of placing supports under the floors of plaintiffs' building, and was made without objection by them, and that the removal of the wall was by direction of the building inspectors. * * * Judgment of non-suit was properly entered, and it is now affirmed."

McCarren v. O'Brien, 35 Pitts. Legal Journal (N. S.) 40.

This case came up under the Act of June 7, 1895, P. L. 135. Plaintiff filed a bill to enjoin defendant from tearing down the wall of plaintiff's frame house in order to put up a party wall, as provided for in the Act. Bill dismissed.

Plaintiff and defendant were the owners of adjoining lots in Penn Avenue, Pittsburgh. Plaintiff's lot had thereon a two-story frame dwelling house, the wall of which was two inches from the line of defendant's lot. Defendant's lot was improved by a two-story brick dwelling. The walls dividing plaintiff's and defendant's properties were in no sense party walls. Defendant tore down his dwelling, intending to erect a three-story brick and stone business building. Desirous of erecting a party wall, which necessitated the removal of the west wall of plaintiff's frame building, he applied to the Bureau of Engineers and Surveys of the City of Pittsburgh under the provisions of the Act of 1895, P. L. 135. The wall located pursuant to the provisions of said Act occupied six and one-half inches of plaintiff's land.

Conclusions of law by Frazer, J.:

"The law in regard to the erection of party walls in cities has been in existence so long and has been passed upon so frequently by our courts that it is now well settled. That a lot owner may erect a party wall can hardly be denied, and as we understand the decisions it makes no difference whether the land is vacant or occupied. In appeal of Western National Bank, 102 Pa. 183, Judge Trunkey says: 'Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken away from him by the adjoining owner building exclusively upon his own land either to the line or a short distance therefrom. The first builder is he who first elects to make a party wall and his right cannot be defeated by the

act of another.' The act of June 7, 1895, referred to in the third finding of fact being substantially the same as the law relating to party wall in the city of Philadelphia, and in the absence of an allegation of non-compliance with the law, or some failure or neglect upon the part of defendants, the case just quoted from, in our opinion, rules this. As the law now stands every person who becomes the owner of a lot of ground in a city of the second class does so with the understanding that his lot is subject to the right of the adjoining owner to erect a party wall at any time, and he must also understand that the right is not exhausted by the erection of such wall, as either owner may tear down an existing party wall which is unsuited for a proposed new building and erect within reasonable bounds a wider and stronger one; *Hoffstot v. Wright,* 146 Pa. 336; [632?] *Deringer v. Wright,* 155 Pa. 612.

Defendant having the right to erect a party wall, and having complied with the law relating to such walls, plaintiff's bill must be dismissed. Whether under the circumstances of this case plaintiff will suffer special injury by the erection of the proposed party wall for which he is entitled to recover damages is not before us and need not be discussed."

Heron vs. Houston, 217 Pa. 1

Party wall erected under the provisions of the Act of June 7, 1895, P. L. 135,—Pittsburgh Act.

Bill in equity to enjoin the removal of or the cutting into a wall built wholly on defendant's property. Bill dismissed.

Mr. Justice Stewart, opinion (Page 3):

"It is too late at this day to question abstractly the right of the legislature to confer upon municipalities the power of regulating party walls. Never since we have been a state have we been without legislation of this kind; and every enactment on the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the other's land, for the construction of a party wall for their common enjoyment and use. *This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to disturb, but its constitutionality has been recognized by judicial authority in unmistakable terms.* 'There can be no available objection', is the language of the court in *Evans & Watson v. Jayne*, 23 Pa. 34, 'to the principle upon which our laws as to party walls is based. * * * The principle is no invasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line.' The principle upon which these enactments rest is the general police power of the state. While it must be admitted that they are to a certain extent an interference with that exclusive enjoyment ordinarily incident to ownership of land, and are therefore to be strictly construed: *Hoffstot v. Voight*, 146 Pa. 632; yet our adjudication under them are but so many repeated recognitions of their correspondence with constitutional limitations.

Nor can the other question sought to be raised by appellant be regarded as an open one. A strict construction of the statute leaves the appropriation of appellant's property, for purposes of a party wall, within their legitimate operation according to our own adjudications. In *Appeal of the Western National Bank,* 102 Pa. 171, it is said: 'Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom.' What is true of the law relating to Philadelphia applies with equal force to the particular statute here under consideration. *The fact that the erection of the party wall here complained of will involve the appropriation and possible removal of appellant's eastern wall, built wholly within his own line,* and so contract the dimensions of his present hall or entry to his building, only furnishes another illustration of how general laws in their application may in individual cases result in apparent severity and injustice. Such apparent inequality necessarily results; but all are alike exposed to the chance, *and the risk is part of the price which each pays for equal participation in all that is provided for the general safety and the common good.*"

Heron v. Houston, 969 October Term, 1905, In Equity.

Common Pleas, Allegheny County.

Opinion, Frazer, P. J.:

" * * * It seems to us the constitutionality of party wall legislation has been settled in this state. Such legislation has been in force in Philadelphia for more than one hundred and twenty-five years and has always been sustained by the courts. In our city, the law relating to party walls in force previous to the act of 1895, was before the Supreme Court and was upheld in *Hoffstot vs. Wright*, 146 Pa. 636. In *Western National Bank's Appeal*, 102 Pa. 183, Mr. Justice Mitchell, in passing upon the law relating to party walls in the city of Philadelphia says:

> 'Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom. The first builder is he who first elects to build a party wall, and his right cannot be defeated by the act of another.'

If party wall legislation is valid in the city of Philadelphia, we see no reason why it should not be valid in this city, and binding upon property owners if strictly followed. It is not alleged in the bill that the defendants or either of them is attempting to act beyond the strict letter of the law. If the Act is constitutional, and we are of opinion

it is, its provisions are applicable to all cities of the second class and necessarily apply to the properties of both plaintiff and defendant. The fact that plaintiff's house was erected before the territory in which it is located became a part of the city, is immaterial. Such legislation being a police regulation applies alike to all portions of the city, without regard to the time when the different localities became annexed to the municipality. If it did not so apply, the constitutional objection would have to be sustained.

In *McCarren v. O'Brien,* 35 Pitts. Legal Journal 40, in passing upon the scope of the Act of 1895, we followed *Deninger vs. Hotel Company,* 155 Pa. 612, and found that as the law now stands every person who owns a lot of ground in a city of the second class, holds it with the understanding that his lot is subject to the right of the adjoining owner, within the limitations prescribed by the Act, to erect a party wall at any time, and that the right is not exhausted by one erection, as either owner may reconstruct the wall within reasonable bounds by a wider and stronger one. We have not been convinced that the conclusion reached in that case was erroneous.

The demurrer is sustained and the bill dismissed."

Herron, Jr. vs. Houston et al., 54 Pgh. Legal Journal 38.

Opinion, Evans, J.—Common Pleas Court, Allegheny County, Pa.

Bill in equity to enjoin the removal of a wall to permit the erection of a party wall.

" * * * Plaintiff alleges that the wall is a good, sound, substantial and sufficient wall, * * * Said defendants are about to take down the said wall and erect a party wall, under the provisions of the act of assembly of June 7th, 1895, entitled, 'An Act to regulate party walls in cities of the second class.' Plaintiff alleges that the aforesaid Act of Assembly is unconstitutional, null and void, because it provides for the taking of private property for private use, not even making provision for any compensation for damages. Plaintiff further alleges that it has become customary to erect steel frame buildings, and that the erection of this party wall would prevent the erection of a steel building. Similar acts of assembly providing for the erection of party walls have been declared constitutional, so that it would be a waste of time to cite authorities sustaining the constitutionality of the act in question."

Mercantile Library Company vs. University of Penna., 220 Pa. 328.

Mr. Justice Mestrezat, (p. 330):

" * * * It is true, as argued, that a wall between two properties need not necessarily rest equally on both properties to constitute it a party wall. It may even be wholly on one of the two properties and still be a party wall if it was so intended by the builder, or subsequently recognized and treated by the owners of the adjacent properties as a party wall. It is also true that if a builder lay a foundation wall extending as a party wall on his neighbor's lot he cannot erect thereon a wall wholly within his own line and prevent the erection from being a party wall. *It is equally true that the owner of a lot of ground in Philadelphia cannot*

be deprived of the right to make a party wall between himself and his neighbor by his neighbor building exclusively upon his own land, either to the line or a short distance therefrom. The first builder is he who elects first to make a party wall, and his right cannot be defeated by the act of another: *Western National Bank's Appeal,* 102 Pa. 171."

Benner vs. Pollard, 53 Pa. Super. 227,

Henderson, J., (p. 232):

" * * * every owner of a lot in Philadelphia has a statutory right to erect a party wall between him and an abutting owner and to enter on the adjoining lot for that purpose up to the permitted limit."

Later decisions, all to the same effect, and as late as 1920, are the following:

German Nat. Bank vs. Mellor, 238 Pa. 415.
Stevenson vs. Mellor, 246 Pa. 596.
Clothier vs. Hoffman Co., 261 Pa. 83.
O'Malley vs. De La Puente, 72 Pa. Super. 102.

In *Thompson vs. De Long,* 267 Pa. 212, the Supreme Court of Pennsylvania reaffirms its decision in the case now on argument, in these words:

"Notwithstanding the division wall, or the defects therein (*Ricart v. Scott,* 7 Watts 460), defendant might lawfully replace his old building with a new one; and, if properly done, he would be in the exercise of a right and not liable to the adjoining owner; *see opinion of this court by Mr. Justice Moschzisker in Jackman vs. Rosenbaum*

Company, 263 Pa. 158, 170; also *Buck v. Weeks*, 192 Pa. 522, and *Swisher vs. Sipps*, 19 Pa. Super. Ct. 43."

Party fence law is analogous to party wall law. The party fence law had its origin in Pennsylvania in the Act of Nov. 27, 1700, 2 Stat. at L. 70, 21 years before the party wall law was passed, but during this period, as already argued, there was in practice some party wall law.

> "That where any neighbors shall improve land adjacent to each other so that any part of the first person's fence becomes the partition fence between them, in both these cases the charge of such division fence (so far as enclosed on both sides) shall be equally borne and maintained by both parties."

Pennsylvania has never been without a similar party fence act, the last legislation being the Act of April 14, 1905, P. L. 162, Section 1.

Dysart vs. Leeds, 2 Pa. 488 (1846).

> "An occupant has the right to place his fence exactly on his boundary, in anticipation of its becoming the division fence; and consequently as much on his neighbor's land as on his own."

The constitutionality of these Acts does not seem to have been questioned. In applying the analogy—the stone partition fence requiring at least three feet of ground; the worm rail fence requiring at least four feet of ground will be recalled.

The above cited cases may be classified as follows, the courts holding:

(a) Party wall legislation is constitutional.

(b) Party wall legislation was passed in the exercise of the police power.

(c) Party wall law in Pennsylvania is a settled rule of real property,—an easement,—a dedication by law of a portion of land for party wall purposes, that enters into all titles to real estate.

(d) Neither the Pennsylvania Constitution nor the statutes provide for compensation to the non-builder for consequential damages, and the courts have uniformly held that none need be made.

4. *The enactment of the Pennsylvania Party Wall Law was under the police power of the State, and is a proper exercise of said power, and, therefore, where private property is affected by the exercise of this power, no compensation need be made or can be recovered, unless expressly so provided by the statutory enactment.*

That the Party Wall legislation of Pennsylvania was enacted by virtue of the police power of the Commonwealth has been established:

(a) by the express statement to that effect of the Supreme Court of the State, in case after case, and by the reasoning of that court in the cases above cited and others that could be cited;

(b) by the genesis of party wall legislation in other countries, where invariably such laws had their beginning after some great fire and catastrophe; for example, the British Act of Parliament after the great London fire of 1666;

(c) by the terms and by the recitals of many of said Acts in Pennsylvania.

Mr. Justice Clark, in *Barns vs. Wilson*, 116 Pa. 303, speaking of party walls said:

> "Titles to real estate are everywhere held subject to such constitutional and legal conditions affecting the enjoyment thereof as shall from time to time be established; all are subject to the Commonwealth's right of eminent domain and to such statutory and other police regulations as affect the safety, health and good order of society. One tract of land, from its mere location with respect

to another, may owe it a servitude, and one man must so use his property as not unnecessarily to injure another."

Again, it was said by Mr. Justice Mitchell, in *Hoffstot vs. Voight*, 146 Pa. 632:

> "The regulation of party walls is a very ancient for of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. * * * But such regulation, as it exists in this most other States, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant."

In *Heron vs. Houston*, 217 Pa. 1 (1907), it was said:

> "The principle upon which these enactments rest is the general police power of the State."

In the case now in controversy (*Jackman vs. The Rosenbaum Company*, 263 Pa. 158), the Supreme Court said, (Transcript of Record, p. 116):

> "Defendant's entry upon the land of plaintiff for the purpose of building a party wall having been made under and by virtue of the police power was lawful. * * * The party wall system represents a valid exercise of police power."

The court of last resort of Pennsylvania, in the interpretation of this party wall law of Pennsylvania, expressly decided, upon the authority of an unbroken line of cases in the Supreme Court of Pennsylvania, that the action of defendant in error was in accordance with the

party wall law of Pennsylvania; that such law was a proper exercise of the police power; that there could be no recovery for the consequential damages claimed by the plaintiff in error, because there was no provision therefor in the statute; that under the law of Pennsylvania injuries to property from the exercise of the police power were *damnum absque injuria*, and that the party wall law of Pennsylvania had long since become a rule of real property in said state subject to which all titles are taken.

Accordingly, plaintiff in error comes into this court and invokes the jurisdiction of the Supreme Court of the United States, and cites the Fourteenth Amendment to the Constitution of the United States, and says that the party wall statutes of Pennsylvania are in violation of this Amendment. This Amendment to the Constitution was not adopted until the year 1868, and prior thereto a State, so far as it was not fettered by its own Constitution, could do as it would with the property of its citizens.

The Constitution of the United States, prior to the Fourteenth Amendment, placed no limitation upon the power of the State, with the exception of the limitations relating to the obligation of contracts and *ex post facto* laws.

In *Baron vs. The Mayor and City Council of Baltimore*, 7 Peters, 247, Mr. Chief Justice Marshall, said:

> "* * In their several constitutions, they [the States] have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which the judge *exclusively*, and with which others interfere no farther than they are supposed to have a common interest."

which language is repeated in *Withers vs. Buckley,* 20 Howard 84.

These party wall laws in Pennsylvania had created a settled rule of real property in that state over 150 years before this Fourteenth Amendment was passed.

But even the Fourteenth Amendment to the Constitution of the United States is not a limitation upon the police power of the State, and could not be used to overturn settled rules of property, under which titles to real estate had been transferred and acquired long before its adoption.

12 Corpus Juris, 1197:

> "D. Police Power as Affected by Constitutional Guaranty. The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, do not limit, and were not intended to limit, the subjects on which the police power of a state may lawfully be exerted. These guaranties have never been construed as being incompatible with the principle, equally vital, because essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Citing many cases.

In *Chicago & Alton R. R. Co. vs. Tranbarger,* 238 U. S. 67, 76 (1915), the Supreme Court of the United States said:

> "(3). But a more satisfactory answer to the argument under the contract clause, and one which

at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property.

It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line vs. Goldsboro,* 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. So. Ry. vs. Ohio,* 173 U. S. 285, 292; *C., B. & Q. Ry. vs. Drainage Commissioners,* 200 U. S. 561, 592; *Bacon vs. Walker,* 204 U. S. 311, 317."

New Orleans Gas Co. v. Drainage Commission, 197 U. S. 453.

A statute of the State of Louisiana gave a board known as the Drainage Commission of New Orleans power to execute a plan for the drainage of the city of New Orleans, and vested this board with the power of eminent domain. In executing this plan it was found necessary to change the location in some places of the pipes and mains theretofore laid by the gas company.

The gas company being compelled to change these pipes at its own expense sued to recover the expenditures which it had to make. The Supreme Court held that the Drainage Commission operated by virtue of the police power, and citing *Chicago, Burlington etc. Railroad vs. Chicago*, 166 U. S. 226, 254, said:

> "* * * In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case."

The plaintiff in error admits that The Rosenbaum Company had the legal right to build this party wall and to take down the old wall in order to replace it with a party wall, and he admits that the right was exercised in the manner prescribed by the statute. Unless, then, there is some express provision of law calling for compensation, there was no "injury" even if there was "damage."

It will not do to say, as in effect plaintiff in error says: "I have been injured, therefore I must be recompensed. The common law, the Constitution of Pennsylvania and the Constitution of the United States require that I shall be given a remedy for my losses, and that I shall be compensated for such losses."

As has been shown, neither the Constitution and laws of Pennsylvania, nor the Constitution of the United States, require compensation for damages arising from the exercise of the police power of the State, and the like is true of the common law.

In *Thompson vs. Hill*, 22 Law Times Rep., 820, Bovill, C. J., said:

"No duty is imposed either by common law or by statute on the building owner to fence up an aperture made by the pulling down and rebuilding of a party wall."

And Wiles, J., said that the only duties incumbent upon one who tore down and replaced a party wall were those placed upon him by the Metropolitan Building Act of 1855, 18 and 19 Vict. c. 122. The plaintiff in that case claimed for consequential damages arising from having his building exposed to the weather during the operation of rebuilding a party wall.

In *Bryar v. Willis,* 23 Law Times Reporter, 463, the court holds that the provisions of the Metropolitan Building Act above referred to which required the owner who replaced a party wall to make good "all damage occasioned thereby to the adjoining premises" applied only to the making good of the party wall and not the adjoining premises, and held that the builder of a party wall was not compellable to pay for consequential damages.

Bovill, C. J., says, (p. 465):

"It seems to me that the Act draws a distinction between the expense of doing repairs or rebuilding, and that of remedying the consequent damage. With regard to the former expense there are express provisions, but under the circumstances of this case I do not see that the Act obliges the building owner to repair the damage, amounting to 1118£ which was done to the defendants' house."

Willes, J., says:

"* * * The Act cannot be said to have compelled the building owner to make the repairs

rendered necessary by the work he was justified in carrying out. The building owner is authorized to reinstate a party structure, but he is not compelled to do more."

These cases do not square with the contention of plaintiff in error that a common law duty exists to make good his consequential damage.

An illuminating case defining police power, or rather showing the distinction between police power and the right of eminent domain, is *Commonwealth vs. Plymouth Coal Co.*, 232 Pa. 141. The court below, in its opinion, which was adopted Per Curiam by the Supreme Court, said:

"The police power is distinguished from the right of eminent domain in that the state, by exercising the latter right, takes private property for public use, thereby entitling the owner to compensation under the constitution, while the police power, founded as it is on the maxim '*sic utere tuo ut alienum non laedas*', is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and in this case, also the specific) benefits resulting from the exercise of the police power: 22 Am. & Eng. Encyc. of Law (2nd ed.) 916, and cases there cited."

The statute under consideration by the court in the Plymouth Coal Company case above cited, was the Anthracite Mining Act of June 2, 1891, P. L. 176, Article X, Section 3 (3 Purd. 2566), which required the owners of adjoining coal properties to leave a pillar of coal in each vein along the line of the adjoining properties of sufficient width to protect the adjoining properties in case of the abandonment of either one and its becoming flooded with water. It was objected that the statute was unconstitutional and a violation of Section 10, Article I, of the Pennsylvania Constitution, and the Fourteenth Amendment to the Federal Constitution. The court below held it to be a constitutional exercise of the police power, and the Supreme Court affirmed this decision on the opinion of the court below. Observe the similarity of these facts to a party wall case.

By way of general answer to much of the discussion of cited cases by plaintiff in error, defendant in error invites the attention of this court to the following suggestions:

The argument of plaintiff in error misapprehends the foundation on which rests the "law of party walls." His argument rests on the constitutional restrictions upon laws which take property under the *State's right of eminent domain,* ignoring the difference between those laws and laws which affect property under the *State's police power.*

The party wall statute, as is admitted by counsel for plaintiff in error, does not provide for compensation. Therefore, according to the contention of plaintiff in error, it must be void. Yet, as stated, these laws as settled rules of real property have been recognized by the courts of Pennsylvania and enforced for over two

hundred years. The constitutional restrictions requiring compensation, referred to by appellant, do not, these courts have said, apply to those statutes passed in the exercise of the police power, and these party wall statutes have been passed—so the same courts say—in the exercise of this police power.

But, in addition to judicial authority, which we find in reported decisions, we also have direct, written authority in the Constitution of Pennsylvania, which by Section Third, Article XVI, provides:

> "And the exercise of the police power of the State shall never be abridged."

The authorities cited by plaintiff in error on eminent domain have no application whatever to statutes passed under the police power of the State, because, as to the statutes exercising the right of eminent domain, there is an express limitation, namely, they must be with compensation; while as to statutes exercising the right of police power, there is no such limitation, either express or implied, but abridgment is in so many words directly prohibited by the Constitution.

But even as to property taken by the State, or those acting under its authority, in the exercise of the right of eminent domain, for which, under the constitutional provision, there must be compensation, the courts of Pennsylvania have held again and again that this compensation does not include consequential damages,—such damages as are claimed by the plaintiff in error in this case.

Monongahela Navigation Co. vs. Coons, 6 W. & S. 101.

Phila. & Trenton R. R. Co., 6 Wharton 25.
O'Connor vs. Pittsburgh, 18 Pa. 187.
Freeland vs. Penna. R. R. Co., 66 Pa 91.
Fyfe vs. Turtle Creek Borough, Appellant, 22 Pa. Super. Ct. 202.

This latter case commented upon the hardship of the rule and upon the fact that it took a provision of the constitution to give to the owner of property injured through a taking for eminent domain the same protection which had been extended to him whose property was actually taken from him and appropriated by the government.

The argument of plaintiff in error confuses terms. There may be damage, but no injury in law. Injury arises from violation of a legal right—from a wrong. Defendant in error did nothing it was not by law authorized to do. Hence there was no invasion of the legal rights of plaintiff in error. He may have suffered damage. This alone, however, gives no right of action.

In 1 Corpus Juris, 964, it is said:

"E. Injury and Damage—1. In general. While the term 'injury' is sometimes used in the sense of 'damage', and has been defined as damage resulting from an unlawful act, there is, properly speaking, a material distinction between the two terms. An injury in the legal sense is a wrong, the violation of a legal right; while damage is the harm, detriment, or loss sustained by reason of the injury.

2. Damage Without Injury—a. In General. To constitute an injury there must be a violation of some legal right, and there are many cases in

which a person may sustain actual damage without sustaining any legal injury. In such cases the damage is *damnum absque injuria*—damage without injury, and no cause of action arises in favor of the party sustaining it against the party by whose act it was caused. But no damage for which a recovery is expressly authorized by statute can be deemed *damnum absque injuria.*

b. Exercise of Legal Rights. No cause of action arises from the doing of a lawful act or the exercise of a legal right if done or exercised in a lawful and proper manner, the resulting damage, if any, being *damnum absque injuria.*"

Many cases are cited in support of the text.

The argument of defendant in error, except that relating to the objection to the jurisdiction of this court on this appeal, may be summed up in the following propositions:

1st. The party wall legislation of Pennsylvania was a proper exercise of the police power of the State.

2nd. Where private property is affected by the exercise of rights under the party wall law of Pennsylvania, no compensation can be demanded, because it is *damnum absque injuria.*

3rd. The party wall legislation of Pennsylvania, which has been in force for over 200 years, did not provide for compensation to the party whose property was affected by the party wall law, and especially did not provide for liability for consequential damages.

4th. The party wall law of Pennsylvania has become a settled rule of real property, all titles being made and taken subject thereto.

5th. A claim for consequential damages is not property such as is contemplated by the Fourteenth Amendment to the Constitution of the United States

6th. The party wall law of Pennsylvania, as a police regulation, is not a taking of property within the prohibitions of the Fourteenth Amendment.

7th. The Fourteenth Amendment cannot be invoked to overturn a settled rule of real property, existing for over two hundred years, whereby easements are created, and subject to which burden all titles have been made and taken in all the boroughs and cities of the State throughout that two hundred years.

Respectfully submitted,

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